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FORMS OF MARRIAGE IN ANCIENT INDIA AND THEIR DEVELOPMENT

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ABBREVIATIONS

Āp—Āpastamba Dharmasutra
Aparar—Apararka
Āśv.—Āsvalayana Gṛhyasutra
B or Baudh—Baudhayana Dharmaśastra
Bal—Balambhaṭṭa
Brahmapur—Brahmapurana
Bṛh—Bṛhaspati
Ch.—Chapter
Dev—Devala
G—Gautama
Gov—Govindaraja
Gṛh—Gṛhyasutra
Har—Haradatta
Har—Harita
K. or Kaut—Kauṭilya s Arthaśāstra
Kam—Vatsyayana s Kamasutra
Katyay—Katyayana
Kull or Kul—Kulluka
MBh.—Mahabharata
M t—Mitakṣara
Medh.—Medhatithi
Mn.—Manava Dharmasastra
N or Nar—Narada Smṛti
Paiṭh—Paiṭhinasi
Panc—Pancasayaka
Pancat.—Pancatantra
Śankh.—Śaṅkha Samhita
Schmidt Schm dt s Beitraege zur Indischen Erotik Berlin 1922
[illegible]
Vats—Vatsyayana
[illegible]
Vivad—Vivadaratnakara
Vyas—Vyasa
Westermarck—Westermarck s "The History of Human Marriage" London 1925
Wilken Over de verwantschap—Wilken s Over de verwantschap en het huwelijks- en erfrecht bij de volken van het maleische ras (Reprinted from De Indische G ds 1883 May) Amsterdam.
Y—Yājnavalkya Smṛti
Yam—Yama Smṛti

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I PREFACE

1 As is generally known Ancient Indian Law recognised eight forms of marriage that is the Brahma vivaha the Daiva vivaha the Arṣa vivaha the Prajapatya vivaha the Asura vivaha the Gandharva vivaha the Rakṣasa vivaha and the Paisaca vivaha When however these *forms of marriage are closely examined we come to* the conclusion that from the legal point of view there existed in Acient India not eight but *eleven forms of marriage* In addition to the above we can ascertain from the sources of law the existence of *two special forms named Svayamvara* as well as the form Gandharva vivaha which ought to be divided into two forms i e Gandharva vivaha combined with the Rakṣasa vivaha and the Gandharva vivaha not combined with the Raksasa vivaha

If the Gandharva vivaha be divided into two forms of marriage and the Svayamvara regarded as a separate form the interpretation of the respective rules which are frequently contradictory is greatly facilitated especially in the case of the Gandharva vivaha

2 The difference between the above mentioned forms of marriage was however as far as legal consequences are concerned exceedingly small so that from the legal point of view all forms of marriage could in principle be divided into *orthodox forms of marriage* (Brahma vivaha Daiva vivaha Arṣa vivaha Prajapatya vivaha) and other forms of marriage (Asura vivaha Gandharva vivaha Raksasa vivaha Paisaca vivaha) A marriage contracted according to one of the orthodox forms of marriage entailed different legal consequences from a marriage contracted in unorthodox forms

In Ancient India the form of marriage (विवाह) signified in what way the marriage was contracted

3 Ancient Indian Law is remarkable for the fact that it sought to legislate exactly for every phrase of life If exact rules and legal paragraphs treating for instance of different questions of love are to be found the more so are we able to find in Ancient Indian Law—*strict definitions and* codification of so important an occurrence in life as marriage or the way in which the marriage was contracted that is what विवाह was used

4 I have based my conclusions upon the most important Dharmasastras Arthaśastras Kamasutras Gṛhyasutras and the Mahabharata as also on other sources when the latter deal with the forms of marriage from the legal point of view

5 My special task will be to explain from the strictly legal point of view each particular form of marriage providing an example of each form as well as of the rules connected with every form of marriage I shall also prove—from the legal point of view—the

existence of eleven forms of marriage Further I shall discuss the legal consequences of a marriage contracted in conformity with any of the forms of marriage quoted below Lastly I shall endeavour to demonstrate on the basis of the existing rules and by comparison with other legislation that there existed in India some development of the institution of the forms of marriage although the rules we find in the Smṛtis are rather of a static nature

II LEGAL ASPECT OF THE FORMS OF MARRIAGE IN ANCIENT INDIA

A Rākṣasa Vivāha

6 The Raksasa form of marriage called also Kṣatra is "a marriage by capture" says Śānkh (IV-6) briefly What is meant by "capture" according to the ancient jurists can be seen from other Smrtis *

Capture is a "forcible abduction" says Mn (III-34), G (IV-12), Vās (I-34), B (I-11-20-8), Vi (XXIV-25), N (XII-43), K (III-2), MBh (XIII-44), Y (I-61), Pañc (by Schmidt 529) and similar Āp (II, 15, 12, 2) Aśv (1-6, 8), Kām (31, 231), Harita (Vira Samskāra 856), Devala (Vīr Sams 857) Abducted must be the maiden (Mn III-33, Ap II, 5, 12, 2, N XII-43 MBh XIII-44, Pañc (by Schmidt) 529, Hār (Vir Sams 857), Dev (Vīr Sams 857), who will be wedded MBh (XIII-44) He who takes her away is her suitor (bridegroom) is the saying of some Smrtis like MBh (XIII-44), Kām (31, 231, Vi (XXIV-25), Vas (I-34), Asv (1-6, 8) This suitor or bridegroom was obliged after the abduction to proceed with the marriage according to Kam (§31, 231) The forcible abduction could take place at night according to Pañc (by Schmidt 519) from the house (home) of the maiden, or her father's house, according to Mn (III-33) and Panc (by Schmidt 519) or from a public garden, when the maiden was on her way there (Kam §31, 231) or from a village when she was going to another village (Kām §31, 231), according to the commentator of Vatsyayana's Kamasūtra (§31, 231)

Those are the essentialia negotii of the Rakṣasa-vivāha The Smrtis often give in the slokas (which concern this form of marriage) a kind of commentary as to what must be understood by the expression "forcible abduction" From these sentences it may be seen that the abduction was not allowed to be symbolical but had to be a real

The captor was obliged when capturing a maiden from the house to break open the house of her kinsmen or guardians, according to Mn (III-33) and Pañc (by Schmidt 529) and wage war, as Y (I-61)

* See the story of Vimada in Ṛg Veda I 116, the story of Subhadra and of Ambā and Ambalika won by Bhiṣma for Vicitravirya in MBh

and similarly Dev (Vir Sams §857) declare war on her guardians (Kam 31, 231) that is according to Jayamangala commentator on Vātsyāyana's Kamasutra the protectors of the women (Jayamangala on Kam 31, 231) It is clear that by the expression "guardians" must be understood also her father (Āp II 5, 12, 2), or her kinsmen (MBh XIII 44 Mn III 33, Āp II-5, 12, 9, Vas I-34 Aśv I 6, 8). The expression found in Y (I 61) "wage war" means, according to Āp (II-5, 12 2) that the captor had to overcome the guardians * Vas (I 34) opines that they i e the guardians had to be destroyed by force of arms according to Kam (31, 231) attacked, and according to Har (Vīr Sams §856) attacked and chastised This is not enough cruelty for the legislators They rule that in this war' the guardians in the confusion (Pañc by Schmidt 529) must be killed according to Kam (§31, 231), Mn (III 33), Asv (I 6, 8), Pañc (by Schmidt 529) and beheaded, according to Asv (1 6 8) and MBh (XIII 44), or at least wounded, according to Mn (III 21) or violently used according to Pañc (by Schmidt 529) That this capture was a real capture and not a symbolical one is clear from the circumstance that the girl has to cry out, according to Mn (III-33) and to weep, according to Mn (III-33), MBh (XIII-44) and Asv (I 6, 8) It may argued on the contrary, that the cries of a girl might be proof that this abduction is symbolical as the cries would symbolise the resistance of the girl

7 We thus see that this form of marriage, as well as the next form of marriage the Paisaca vivaha are based on forcible abduction of a maiden But we find in nearly all the Dharmaśastras a rule that forcible abduction is prohibited, and is a crime We see also the various punishments for this crime In Brh (XXII-18) he who steals a woman shall be placed on a bed of hot iron or burned by fire kept up with straw We find the same rule in Vyasa (Vivada ratnakara p 317) but this source adds that the entire property of a stealer of a maiden shall be confiscated and he shall be put to death Y (II-287) makes this dependent on whether the maiden belongs to a higher caste or not In the first case the abductor must be condemned to death in the second case he has to pay the lowest fine only According to K the punishment depends on whether the maiden has gold ornaments on her person or not In the first case the highest amercement shall be imposed in the second case a fine of 200 panas only (K IV ch 12) According to Brh (XXII-27/28) the thief shall be executed or he shall be fined double the amount According to Mn (VIII 323) the thief shall suffer corporal punishment and according to N (Theft 28) he shall also be deprived of his entire wealth According to Vyasa (Vivadaratnakara p 318) the fine for the stealing a woman amounts to 104 kārṣapaṇas

* Women were considered as booty

It is not the scale of the punishment which is interesting but only the fact that forcible abduction was prohibited If this forcible abduction was prohibited and was a crime how is it possible to admit that marriage based forcible abduction was allowed

Of course it could not be allowed

8. The Rakṣasa-vivāha is only a relic in Smṛtis of some form of marriage which had existed in primitive times In the period of the Dharmaśastras this form of marriage must be considered not admissible and if we find rules concerning them it must be concluded that these rules are archaic like many others to be found in the Ancient Indian sources of law—or that the forcible abduction was only a sham abduction and the robbery became legalised through a solemn act i e the wedding ceremony That forcible abduction without a wedding ceremony did not constitute a state of marriage between the abducter and the abducted appears clearly from Vās (XVII-73) where we find the rule that if a damsel has been abducted by force and has not been wedded with the sacred texts she may lawfully be given to another man as she is considered a maiden A similar rule may be found in MBh (Ādi Parva LXXIII) where we read "there is not the least doubt that our wedding ceremony may take place"

9 It must be added that it appears from the interpretation of the relative rules that marriage contracted according to this form was always effected without the participation of the father or of the guardian of the girl This form of marriage has no pecuniary sequels because the fathers or the guardians did not have to give a dowry or an endowment to the girl and the suitors did not have to make any payment to the fathers or to the guardians for the girl By the act of robbery the girl came under the power of the conqueror and usually became his slave, especially in primitive times

10 This form of marriage is recognised as unlawful probably for members of the Brāhma caste (N XII-44 Mn III-25) but permissible for kings (MBh Ādi Parva LXXIII) As permissible for kings this form of marriage is permissible for members of the Kṣatriya caste (*B I-11, 20, 12* Sankh IV 3 Mn III 24, 26, MBh Ādi Parva LXXIII Pañc IO, 2526)

According to N (XII-39) although unlawful this form of marriage is not worse than the Asura vivāha

This form of marriage should be avoided according to Mn (III-42) and Yama (Vīr Saṁs p 865) which reproduces the words of Mn because from blameworthy marriages blameworthy children are born to men and this form of marriage is recognised as blameworthy (निन्दित) We do not find in other places In Mn this distinction between the forms of marriage as blameworthy and

unblameworthy (निन्दित and अनिन्दित) but only as lawful and unlawful (धर्म्य and अधर्म्य) (Mn III 23, 25, 26) and we also see that some forms of marriage are said to be commended (Mn III 24)

Mn does not give a clear answer as to which forms of marriage were lawful and which were unlawful but gives some theories by which this question may be aswered According to Mn (III-23) Brahma Daiva, Ārsa Prajapatya, Āsura and Gandharva were lawful to the Brahmana and according to Mn (III 25) only Prajapatya, Āsura and Gāndharva What Mn means by the expression "निन्दित" and 'अनिन्दित' is also not clear but as according to Mn (III 29) only sons born from Brahma, Daiva, Ārṣa and Prājapatya* were endowed with Brahmanic glory and respected by cultured persons, these four forms of marriage might pass as blameless forms and the other forms from Āsura (i e Āsura, Gandharva, Rakṣasa and Paisaca might pass as blameworthy forms These four latter forms of marriage are inferior forms although according to Bhâṣya on Mn III-41 only Gandharva Rakṣasa and Paiśaca were considered inferior forms of marriage

The children born in this form of marriage are blameworthy (Mn III 42, Yama in Vir Sams p 865) i e defective (Bhasya on Mn III 24)

11 In all these Smṛtis in which the Paisaca vivaha is known the Raksasa vivaha takes the penultimate place in the list of the forms of marriage i e the seventh place (Mn III-21, Y I 59 61, Śankh IV-2 Vi XXIV 19 K III G IV, B I 11, 20, Nar XII-38/39) excepting in Aśv Grh (I-6) where it takes the last place after the Paisaca vivaha In Ap which source does not mention the Paisāca-vivaha it takes the last place and in Vās (I 29) which also does not mention the Paisaca vivaha the penultimate place i e before Āsura-vivaha

This form of marriage is known in Mn , Y , Śankh , Vi , K , G , B , N , Yama, Har , Dev MBh Kam , Pañc , Āsv Grh

B Paisaca-vivaha

12. The Paisaca form of marriage is a marriage based on deception of the girl as is clearly stated in Y (I 61) This form of marriage is similarly defined in Śankh (IV-6) who says that the Paiśâca form *of marriage takes place by stratagem Hār (Vir Sams 858) uses the* expression 'based upon want of care Only these sources give such a definition of this form of marriage All other sources, although using other words determine this form of marriage as based upon seduction of the girl during her insensibility or upon sexual intercourse with her during insensibility Concerning seduc

* Four marriages mentioned successively

tion of the girl we read in Dev (Vir Sams 858), Mn (III-34) wherein the author adds that the girl had to be seduced by stealth (Mn III-34) and afterwards in Kaut (III-2) About sexual intercourse with the girl, under the conditions mentioned below, we read in Nār (XII-43), Baudh (I-1, 11, 20, 9) and similarly in G (IV-13), Vi (XXIV-26) and Kam (§31, 230) That the seduction or sexual intercourse with a maiden had to take place during her insensibility appears from all sources which are interested in these problems Only G (IV-13) determines that the girl has to be deprived of consciousness Other sources like Vi (XXIV-26), N (XII-43), Kām (§31, 231), Dev (Vir Sams 858), Har (Vir Sams 858) understand that the girl is 'insensible" when she is asleep and unconscious when the girl is asleep and intoxicated, or when she is asleep, intoxicated and out of her senses [according to Mn (III-34) and B (I-11, 20, 9)], or when she is asleep, unconscious, or mad, or in distress [according to Dev (Vir Sams 858)] According to Jayamangalā, the commentator on Kām (§31, 231) this form of marriage takes place when the girl who is asleep on the lap is left alone This form of marriage is similarly determined in Āsv (I-6, 7) There we read that the man can 'carry her off, while she is sleeping or when she is not paying attention

We see here likewise two separate "essentialia negotii' of this form of marriage But the deception of the girl on the one hand and the seduction of or sexual intercourse with a girl during her insensibility on the other are not two different essentialia negotii" of this form of marriage We may see it when we read the commentaries on Y In Y this form of marriage is regulated as follows ' Paiśaca-vivaha takes place by deceiving the girl But what is the deception of the girl? Mit determines that it consists in deceitfully and fraudulently carrying away of the girl when she is asleep (Mit on Y I 61), and Bal determines that it is not by force but fraud practised on the girl (Bal on Y-I 61) In other words therefore, the deception of the girl is nothing more than the abduction of the girl when she is insensible

13 If the Rākṣasa vivaha was capture or abduction of a girl by force the Paiśāca vivaha was the carrying away of (or sexual intercourse with a girl) deceitfully and fraudulently In other words the Paiśāca-vivaha is only like a part or special branch of the Rakṣasa-vivāha it is a variant of the Rākṣasa vivaha only The difference between Rakṣasa vivaha and Paiśaca vivaha is not great In *Rākṣasa vivaha* the girl was taken away by force in *Paiśaca vivāha* the girl was taken away by deception and fraud

14 If we admit that Paiśāca vivāha is only a variant of the Rākṣasa vivaha and that this form of marriage is also based on forcible abduction (and that is undisputable) we must apply to this

form all that was said about the Rākṣasa-vivaha Thus, we see that this form of marriage also was **not allowed** This form of marriage must be considered as disallowed even more than the Raksasa-vivāha because it is based on fraud• According to the Smrtis all acts (documents) executed by fraud become nullified (Mn VIII-165, Y II-89, Vi VII-7, N I-137, Brh VIII-23, Katyāyana in Aparārka p 686) as *well as acts* executed by force (Mn VIII-168, Y II-89, Vi VII-6, N I-137, Bṛh VIII 23, Yama in Parāsaramadhava Vyavahara p 162) The seduction of the girl took place in this form of marriage during insensibility i e when she was asleep, intoxicated or out of her senses In the Smrtis we very often find rules which declare that a transaction done by a person not in full control of his action is invalid (N I-40 K III ch 1— अपगृहीत) This also applies to an intoxicated person (N I-137, Vi VII-10, Y II 32, Bṛh VIII-23, K III ch 1)

This form of marriage is also based on seduction of a girl i e most probably on *sexual intercourse against the will of the maiden* Such sexual intercourse is a very great crime according to the Smṛtis For this crime the capital penalty is prescribed in Matsyapurana (Vivādaratnakara p 401) and according to Y (II 288), Nar (XII-71) in the case of the girl being of a higher caste According to other sources banishment is prescribed as the penalty (Āp II-10 26-21) or, the "*lex tallionis*' is to be applied i e the cutting off of the *penis* and *scrotum* (Brh XXIII-10, or, according to Kullûka commenting Mn VIII 364) the hands (Y II 288 K IV, ch 12), or two fingers are to be cut off (N XII 71 Śankh Likh in Aparārka p 859) Other sources give the penalty for this crime as confiscation of property (Āp II, 10 26 21 Brh XXIII 10 K IV ch 12)

Thus we find here another argument in favour of the statement that the Paiśaca-vivâha at the time in which the Smrtis were in force was no longer a permitted form of marriage and that the rules which we find in the Smrtis are archaic Another argument for this statement is the fact that the Āpastamba Dharmasûtra and the Vasistha Dharmasutra do not mention this form of marriage

It is improbable that abduction according to this form of marriage could be a sham abduction although it could probably be so in the Rakṣasa-vivaha

15 It is clear that this form of marriage when it took place, was effected without the participation of the father or of the guardian of the girl and that therefore it had no pecuniary sequel Through this act of abduction the girl came under the power of her husband like a slave

16 The Paisaca vivaha which—as said by John D Mayne (A Treatise of Hindu Law and Usage Madras 1900) is more like a sud

den lust of the ourang-outang than any thing human—is considered an unlawful form of marriage probably for the Brâhma caste (N XII-44, Mn III-25) so much so that it should never be practised (Mn III-25, MBh XIII-44, Ādi Parva 73) But this form of marriage is permissible for Vaiśyas and Śūdras according to Mn (III-23) B (I-11, 20, 13) and Pañc IO. 2526 According to the same Smrti it is permissible for the Kṣatriyas too (III-23) These conflicting opinions in Mn are due to the commentators who tried to reconcile the various interpretations

This form of marriage should be avoided according to Mn (III-42) and Yama (Vir Sams 865), because it is blameworthy marriage From this marriage blameworthy offspring are born (Mn III-42, Yama in Vir Sams p 865)

17. In all the Smrtis in which the Paisāca-vivāha is known this form of marriage takes the last place in the list of the forms of marriage i e the eighth place (Mn III-27, Y II 59-61, Śankh IV-2, Vi XXIV-19, K-III, G IV, B I-11, 20, N XII-38, 39) with the exception of the Āśv Grh where it takes the penultimate place (seventh)

This form of marriage is known to Mn, Y, Śankh, Vi, Kaut, G, B, N, Dev, Hār, Kām, Āśv, Gṛh

C. Asura-vivāha

18. The Asura-vivāha called also Manuṣa is defined clearly and in few words only in Vi (XXIV-24) We read that "if the damsel is sold to the bridegroom" it is called an Asura-marriage In other words this form of marriage is based upon the purchase of the maiden by the suitor *

In this form of marriage the maiden (bride) (Mn III-31, Vās I-35, B I-11, 20, 7, Sankh IV-5, Asv I-6, 6, Vi XXIV-24, Nār. XII-42, K III-2, Paiṭh (Vir Sams 853, MBh XIII-44 and I-102, Pañc by Schmidt 527) can be married or wedded (Mn III-31, Ap II-5, 12, 6, Vās I-35, B I-11, 20, 7, Paiṭh in Vir Sams 858, MBh XIII-44, Āśv I-6, 6) when the bridegroom (suitor) (Āp II- 5, 12, 1, Āśv I-6, 6 etc) gives money** or other valuable goods (Mn III-31, Āp II-5 12, 1, G IV-11, Vas I-35, B I-11, 20, 7, Śankh IV-5, Vi XXIV-24, N XII-42, K III-2 Y I-61, MBh XIII-44, I-102, Pañc by Schmidt 527, Paiṭh Vir Sams 858) to her father or kinsmen (Āp II 6, 13, 12, N XII-42, B I-11 20 7 Mn III-31, MBh XIII-44) or as G (IV-11) clearly states to those who have authority over a female.

We know that the woman could never be independent, she had to be protected by her father in her infancy, by her husband, during

* The marriage of Kaikeyī Gāndhārī and Madrī (in the epics), Isidāsi (in the Pali literature) etc.

her youth, by her son during her seniority (Mn IX-3, V-148, MBh XIII-46,14, Y. I-85,86, B II-3,45, Vās V-3, Vi XXV-13, Apar 109 and others). For that reason it must be accepted that the designation of persons to whom the bridegroom or suitor gives money for the maiden is "these who have authority over the maiden"

The most difficult question regarding this form of marriage is the question of how much the suitor had to pay for the maiden We do not find a clear answer We find in MBh (I-102) the statement that a fixed amount has to be paid for the maiden whereas we find in Āp (II-5,12,1) that the suitor has to pay according to his ability, similarly in Mn (III-31), where we read that the suitor has to pay as much as he can afford We see here for the first time that the price of the maiden has to be high and that the bridegroom has to make an effort to pay this price A similar definition of the amount to be paid for the maiden is to be found also in K (III-2) where we read that plenty of money has to be received (*scilicet* by the persons who have authority over the maiden) Similarly in Y (I-64) This Dharmaśāstra designates this form of marriage as marriage in which money is largely given (see Mit ad I-61) Bāl gives a philological explanation for the word आदानम् , which can be found in the text. According to him this word means 'the giving (दान) of a large quantity (आ) (Also in MBh (XIII-44) and in Pañc (by Schmidt 527) we read that the price paid for the maiden must be high

The precise amount which has to be paid for the bride can be found in Vās (XXIX-21) where we read "If a gift of one thousand oxen fit to draw a carriage (has been bestowed) according to the rule on a perfectly worthy man, that is equal to giving a maiden". It may be seen from this passage that the price of a maiden amounts to 1000 oxen and a carriage But in the same *Dharmasūtra* in another place we find that 100 cows besides a carriage should be given (Vās I-36) That is a passage from the Vedas and we find the same (only enlarged) in Āp (II-16,13,12) To be sure neither of the passages is absolutely binding but these passages give an idea of the scale of payment for a maiden, this amount was, of course, very high in those times

Vās (I-35) mentions that the suitor makes a bargain with the father (See B II-1 2,27)

It must be pointed out that according to Mn (III-31) and Pañc (in Schmidt 527) the bridegroom has to give wealth for his future wife not only to her kinsmen i e to "those who have authority over the maiden", but also "according to his own will to the bride herself" He has to give according to Pañc (in Schmidt 527) vestments, jewels, and gold (similarly *Aśv XVI-1 6*) *

* Concerning the Asura-vivaha recorded in ancient Indian tradition see Dr A S Altekar 'The Position of Women in Hindu Civilisation' p 47-48

19 As the girl is an article of merchandise, all her defects have to be mentioned by the person who gives her in marriage (Mn VIII-205, Y I 66, Nar in Aparârka p 95) If this person gives away the girl without mentioning her defects he is liable to punishment at the highest amercement (Y I-66, Nar in Aparârka p 95) but if he mentions her defects he will be free of punishment (Mn VIII-205) These defects are madness (Mn VIII-205), chronic and loathsome disease (Nār in Aparârka p 95), like elephantiasis (Mn VIII-205) and shortness of limbs (Nar in Aparârka p 95), loss of virginity (Mn VIII-205 Nar in Aparârka p 95) or immodesty or attachment to another man (Nar in Aparârka p 95) Doubtless these "defects" are mentioned in the sources as examples only Although it is not mentioned that these rules are applicable to the Asura-vivâha, it must however be, accepted that they were applied in this form of marriage because they are placed amongst the rules, which relate to the merchandise (Mn)

The preceding sentence in Mn related to the sale of merchandise other than that which was chosen We read there that if after one girl has been shown another be given to the bridegroom, he may marry them both for the same price (Mn VIII-204) In other words if he who concluded an agreement concerning the sale of the maiden gives a girl other than the one promised he has to give the promised girl as well as amercement This rule found only in Mn is very strange on account of the standpoint represented but this Dharmaśastra in other places does not allow the practise of marriage by purchase Therefore, it must be admitted that this rule, like other rules in Mn concerning the Asura-vivâha is archaic

Another very interesting case in law is discussed in Mn i e what occurs if the buyer dies after having paid the price but before the girl has been given away by her father or guardian Some commentators like Kull (to Mn IX-97) add ' before the consummation of the marriage ' According to Mn if after the nuptial fee has been paid for a maiden the giver of the fee dies she shall be given in marriage to his brother if she consents (Mn IX 97) This rule is a consequence of the fundamental notion which is to be found in Mn IX 69 According to this rule if the betrothed of a maiden dies after she has been promised to him she shall be given in marriage to his brother (See Vās XVII-72 Katy in Vir Sams p 739)

The difference between these two rules is not inconsiderable Although it is a case of marriage by purchase the girl must give her consent to her marriage to the brother of the buyer

From the interpretation of these two rules (Mn IX 97 and IX-69) we see, perhaps the first stage of the restriction of this form of marriage in Mânava Dharmasâstra as according to other sources in

the case of Asura vivaha the girl will belong to the father (Vas XVII 72) or shall wait for three menstrual periods and then marry another person (Katy in Vir Sams p 739)

20 It must be pointed out that concerning his form of marriage the sources of law may be divided into two groups One group although it contains the rules relating to the Asura vivaha in other places says that the sale of a daughter was a crime and that for that reason this form of marriage was not to be contracted on the other hand the second group is based on the Vedas and on other rules as well and permits this form of marriage To the first group belong Ap B and Mn to the second group Vas Other sources of law do not discuss this case

There seems to be no doubt that the rules which resolve the non permissibility of this form of marriage belong to the more ad vanced and more recent rules although the sources of law are some times of the oldest Knowing the history of the origin of the Smrtis it can easily be understood *

Concerning the first group of laws it must be pointed out that we find in Mn (III 51) a sentence which says that the father of a girl who knows the law should not accept even a small consideration i e nuptial fee (शुल्क) By accepting a consideration through avarice *he becomes a child seller i e commits a sin That this was a great* sin appears for instance from B (I 11 21 3) where we read Those wicked men who seduced by avarice give away a daughter for a fee who (thus) sell themselves and commit a great crime fall (after death) into a dreadful place of punishment and destroy their family down to the seventh (generation) Moreover they will repeatedly die and be born again All (th s) is declared (to happen) if a fee (is taken) We read also in B (I 1 2 27) that he who gives away his daughter making a bargain sells a portion of his spiritual merit Even Ap clearly declares that the acceptance of a gift and the right to sell (or buy) a child are not recognised (Ap II 6 13 11) i e not allowed The same can be seen from another passage of Mn i e from III 52 This sentence is not easy to understand According to Medh Nar and Nand commentators of Mn this passage must be understood in the following manner But those (male) rela tions who in their folly live on property obtained by (the sale) of women (i e) carriages or beasts of burden and clothing (received in exchange for) females commit sin Also in the ninth book of Mn we read Even a Śudra ought not to take a nuptial fee when he *gives away his* daughter for he who takes a fee sells his daughter

* For nstance in the Dekkan and Gujarat manuscr pts we do not find the rule B I.11 21 3 (see below) See Dr A S Altekar The Pos tion of Women in H ndu C v lisat on p 42 43

† At ano her p ace K says hat the fa her and the mother rece ve money (K. III 2)

covering the transaction by another name (IX-98) If a member of the lowest caste cannot sell his daughter still more a member of a higher caste cannot do so "Nor, indeed,"—concludes Mn—"have we heard, even in former creations of such (a thing as) the covert sale of a daughter for a fixed price, called a nuptial fee" (IX-100)

But not only does he who sells his daughter commit a great sin, but it is declared that a female who has been purchased for money is not a wife, she cannot assist at sacrifices offered to the gods or the manes (B I-11, 21, 2) Kaśyapa has stated that she is a slave (B I-11, 21, 2), Atri (384) says that the girl will remain in her father's gotra and her sons will not be entitled to offer oblations to the ancestors of her husband According to Padma-Purāna (Brahma-Khaṇḍa 24, 26) even the face of the seller should not be seen

These rules make clear the point that these sources of law hold that the sale of a daughter by her father or guardian is not allowed and in consequence that the form of marriage by purchase is not allowed

But contrary to these rules we find quite a different sentence in Vās where we read that the purchase of a girl is mentioned in the following passage of the Veda "Therefore one hundred (cows) besides a chariot should be given to the father of the bride" (Vās I-36) In the next sentence the author of Vas in reference to Cātur-masyas says "She, who has been bought by her husband commits a sin as afterwards she unites herself with a stranger" (Vās I-37) In these two sentences the author of Vas says clearly that the form of marriage by purchase can be contracted

But the author of Vās only cites other authorities (Vedas, Catur masas) and does not give his own opinion on this question

The author of Āp evidently knows the same sentence from the Vedas when he says "It is declared in the Vedas that at the time of mariage a gift, for the (fulfilment of) his wishes should be made (by the bridegroom) to the father of the bride in order to fulfil the law 'Therefore one hundred (cows) besides a chariot should be given'". But the author of Āp gives his own opinion, his own point of view on this question His opinion belongs to the time of the origin of this Dharmasūtra that is to a period later than the Veda, to nearly the same time as the opinion of Mn We read in Āp "In reference to those (marriage rites), the word 'sale (is only used as) a metaphorical expression, for the union (of the husband and wife) is effected through the law" This sale' is a metaphorical expression—says the author of Āp because of the fact that the "gift" has to be returned to the giver, and the marriage has to be effected through the law i e through an action not being in accordance with the legal rules As contrary to the archaic rules of the Veda, at the time of

the legal validity of the Smrtis the act of selling the daughter was not recognised (Āp II 6, 13, 11),—the form of marriage by purchase was not allowed

This interpretation of the legal rules gives me the basis for the statement that all the Smrtis (although—like Vās they recognise the admissibility of the form of marriage by purchase) contrary to the ancient rules (found, for instance, in the Vedas) did not admit the form of marriage by purchase Though the author of Vās states that this form of marriage is admissible, he does not give his own opinion, *but only that of the Veda and per analogiam it must be* accepted that this rule from the Veda has to be interpreted in Vas as in Āp in which Smrti we find a clear interpretation of the same sentence *i e* that the form of marriage by purchase is not allowed We find in Vās another example of the existence of archaic rules in Smrti which were not in use at the time of the legal validity of this Smrti

So we can admit that according to all the Smrtis, although many of them give a different opinion or do not touch on this question, the father or the guardian must not sell a girl, because by selling her, *he commits a sin and the girl does not become a legal wife of* the buyer

21. This form of marriage is similar to the Roman *coemtio* especially *coemtio uxoris* The initiative for a marriage of this form lies with the suitor and the girl has not the right to choose her husband for herself, those in authority over the girl undertook the choice on her behalf (the father, mother or guardian) This choice did not depend on the good qualities of the suitor but primarily on his pecuniary position and on the price he was prepared to pay

The fact that the agreement was concluded between the suitor and *the person who exercised power over the girl—was not consider*ed enough to make the marriage complete It is very probable that the marriage was concluded only after the marriage ceremony had taken place, although as it appears, the participation of the priest was not necessary in this connection

22. The Āsura-vivaha is considered as an unlawful (unrighteous improper) form of marriage probably for the Brahman caste (N XII-44, MBh XIII-44 *Ādi Parva 73) and so unlawful that* it should never be practised (MBh XIII 44 Ādi Parva 73, Mn III-25), but on the other hand in another place in Mn it is considered as lawful probably for the Brāhmanas (Mn III 23) According to G some say even that this form of marriage is lawful for the Brāhmanas (G IV-15) But this form of marriage is permissible for Vaisyas and Śudras according to B (I 11 20, 13, Mn III-34 and Pañc *IO 2520) and to Ksatriyas,* Vaisyas and Śudras according to the

Smrtis last mentioned (Mn III-23) and to Kṣatriyas according to MBh (Ādi Parva 73) And here again the author of Mn gives some theories on the same subject These conflicting opinions are an attempt to reconcile the various interpretations

The Āsura-vivāha should be avoided according to Mn (III-42) and Yama (Vir Sams 865) because it is a blameworthy marriage

From this marriage blameworthy offspring are born (Mn III-42, Yama—Vir Sams 865)

23. This form of marriage—according to the rules—takes the first or the second place in the list of the forms of marriage outside the orthodox forms It takes the fifth place in the general list of the forms of marriage (Mn III-21, Y I-59-61 Śankh IV-2, Vi XXIV-19) after Brahma, Daiva, Ārṣa and Prajāpatya and in Āp (III-5, 12) the fifth place after Brāhma, Ārṣa Daiva and Gandharva According to the rest of the Smrtis the Āsura-vivaha takes the sixth place after Brāhma, Prājapatya Ārsa, Daiva and Gandharva (K III, G IV, B I-11, 20, N XII-38, 39 Āsv Grh I 6) but only according to Vās the sixth and last place in the list of the forms of marriage, after Brāhma, Daiva, Ārṣa, Gandharva and Rākṣasa (Vas does not mention Prājapatya and Paiśāca) (Vās I-29)

This form of marriage is known to Mn, Y, Śankh, Vi, K, G, B, N, Āśv, Gṛh, Āp, Vas, Yama Paiṭh, and MBh

24 We may note that a completely different definition of this form of marriage can be found in Hār This definition—given probably in more recent times—has nothing to do with the classical definitions of this form of marriage We find there the following sentence "When the girl is given away to a man who is suspected by other people, of hypocrisy and deceit, it is Āsura-vivāha" (Vir Sams p 853)

D Arṣa-Vivāha

25 This form of marriage is confirmed by the gift of a bull and a cow

It may be said that the marriage was contracted according to this form when the father (Āp II-5 11, 18 K III-2), or, more correctly speaking who had authority over the maiden (G IV-8, B I-11, 20, 4) gives his daughter in marriage (Mn III-29, Āp II-5, 11, 18, Śankh IV-4 K III-2 Y I 59 MBh Adi Parva 112, Dev Vir Sams 851) or approves of the marriage after receiving (Mn III-29, Āp II-5, 11, 18, G IV-8 N XII-41 Y I 59 MBh Adi Parva 112) from the bridegroom (Mn III-29 Āp II 5 11 18 Dev Vir Sams 851) who should be praiseworthy and not belonging to the same gotra (Dev Vir Sams 851) (which reservations must be understood more as a counsel than an order) a cow and a bull (Mn III-29, Āp II-5, 11,

18, G IV-8, Vas II-32, B I, 11, 20, 4, Śankh IV-4, Āsv I-6, 4, N XII-41, and similarly Dev in Vir Sams 851, Vi XXIV-21, Śankh, Likh Vir Sams 851, K III-2, Kam 23, Y-I-59) *

Sometimes we find in the Smrtis other expressions for instance in Y (2 cows), but always the Smrtis meant a cow and a bull The two well known commentators of Y —Mitâksarâ and Bal explain that the term "2 cows" must be understood as "a cow and a bull' But sometimes instead of a cow and a bull "a suit of clothes" may be *given for the maiden (Śankh Likh in Vir Sams 851) or besides* a cow and a bull a dress (N XII-41) or generally speaking—wealth (Kam 23)

This present of a bull and a cow has to be given "for the fulfilment *of the sacred law" (Mn III-29) i e according to the commen*tators of Mn 'pronouncing the words prescribed for making a gift' (in S B E XXV, ad Mn III-29) It has to be offered "after the first of the burnt offerings of parched grain which are prescribed for *weddings" (commentaries on B Gov cited in S B E XIV, ad B* I-11, 20, 4)

26 There is no doubt that the price paid for the maiden amounting to a cow and a bull and sometimes to a cow and a bull and the other goods was not the real price of the maiden This price being ever on the same scale and not high in comparison with the price paid according to the Āsura-vivâha could not be the real price of the girl Therefore it can be said, that this form of marriage is based on sham purchase

That this form of marriage is based on sham purchase and is not the purchase of a girl by a man is evident clearly from the following words which we find in Mn (III 29) "When the father gives away his daughter according to the rule after receiving a cow and a bull" These words are understood by the commentators or Mn as follows 'It is not with the intention of selling his child" The commentators go farther when they say that the bridegroom shall give to him who has authority over the maiden a bull and a cow and receive them back along with the bride (Gov ad B II-11, *20, 4 in S B E XIV ad B II-11 20 4 MBh Anus 81, 1-2 XIII-4b,* 1-2), therefore, if the bridegroom received his "price" for the girl from this person who has authority over the maiden it cannot be said that the maiden was sold by this person or purchased by her future husband The price that was given was returned probably in the form of a dowry, and therefore cannot be considered as a price nor the marriage as a marriage by purchase, but only by sham-purchase The origin of this form of marriage will be explained below

* For the purpose of getting milk for religious sacrifices

It must also be pointed out that according to Śānkh Likh besides the gift of a cow and a bull or of a suit of clothes, ornaments and a dowry have to be given (Vir Sams 851), which can be taken as proof that not only the commentators but also the later Smrtis represent the point of view that this form of marriage is not a marriage by purchase but only a marriage by sham-purchase

It was pointed out in the interpretation of the Āsura-vivâha that the selling of a girl was a sin The question is whether a pair of oxen given to the father or guardian of the girl and accepted in this form of marriage is to be regarded as a "consideration" (शुल्क) or a "sale" (विक्रय) According to Mn III-53 it is a "vikraya"—a sale because it makes no difference if the gift is small or large (identically MBh XIII-80, 20-21, XIII-45, 20)

But this would only be the case if the value of the girl did not exceed the value of one cow and one bull i e if it were a real marriage by purchase (Āsura-vivaha) In this connection we find in the next *sloka* of Manava Dharmasastra the following sentence "In the case of girls whose relations do not appropriate the bride's gift, it is not a 'sale' It is only a means of honouring the maidens and is entirely harmless" (Mn III 54, identically MBh Anusā 81, 1-2, and XIII- 46, 1-2) which means that there is not the slightest taint of sin in this act (Bhāṣya to Mn III-54)

We have seen that the price given for the girl was according to Mn and other sources of law, returned to the bride or bride-groom, therefore, this gift "is only a mans of honouring the girl" but not a sale The words "means of honouring" are interpreted by the commentators on Mn in the following manner "The receiving of presents on behalf of brides is a means of honouring them, it raises the girls in their own estimation, they come to think that "we are so good that we are being married after receiving pre-per presents" They rise in the estimation of the people also, who look upon such brides as very handsomely fortunate" (Bhaṣya in Mn III-54)

We find the same opinion in MBh (XIII-45-2) where we read "that maiden, in respect of whom nothing is taken by her kinsmen in the form of dower, cannot be said to be sold Her sire and brothers and father-in-law and husband s brother should show her every respect and adorn her with ornaments if they be desirous of reaping benefits, for such conduct on their part always leads to considerable happiness and advantages If the wife does not like her husband or fails to gladden him from such dislike and absence of joy, the husband can never have issue for increasing his race This adorning of the girl with ornaments is the dowry ' So we can see in this quotation of MBh the passage from the marriage by purchase to the marriage by sham purchase and then to the marriage [illegible]

which the dowry is to be given to the future husband of the girl This dowry is the *essentiale negotii* of the orthodox forms of marriage to which this form of marriage also belongs

27. As in the Asura vivaha in this form of marriage too, the marriage depends not on choice exercised by the girl, but on choice exercised by her father or guardian This form of marriage differs from the other orthodox forms of marriage In the other orthodox forms of marriage, the marriage always depended on the father or guardians and sometimes on the fathers and guardians of both parties (for example in the case of the marriage of children), while in the marriage carried out according to this form of marriage, the first stage was the choice executed by the suitor and the next stage was the supplementary consent on the part of the father or guardian

As in the Asura-vivaha, in this form of marriage too, the matrimonial ceremony did not take place before the act of sham purchase, although it is likely that the participation of a priest was not necessary

28 Because this form of marriage is considered *as praiseworthy* (Ap III 5, 12, 3) it is considered also as lawful (धर्म्यं) and *righteous probably for members of the Brāhma caste* (G IV-14, B I-11, 20 10 N XII 44 Vi XXIV 27 Kam 23, MBh Ādi Parva 73 and XIII 44 Panc 10, 2526 see Śankh IV-3) According to Mn (III-23) which source of law gives some theories on this subject, there can be found two expressions i e that this form of marriage is lawful for Brahmanas and commended (approved for) for them (III 24) *as Mn gives the point of view of many law teachers on this* subject According to MBh (Ādi Parva 73) this form of marriage is proper also for a Brāhmana and a Kṣatriya

29 The sons born in this form of marriage are endowed with Brahmanic glory and are respected by cultured persons Endowed with beauty and the quality of goodness possessing wealth and *fame with full enjoyment and righteousness* they live for a hundred years (Mn III 39 40 Yama in Vir Sams p 865 see B I 11, 21, 1, Ap II 5 12 4)

[illegible]

[illegible]

descendants i e six men According to Vi he purifies seven men (XXIV 31) and according to Āsv Gṛh (I 6 1) and Śaunaka (Vir Sams p 863) seven men on the father s and seven on the mother's side *i e* altogether 14 men According to Śankh Likh (Vir Sams p 865) only five men on the father s side and five on the mother's side and himself *i e* altogether 11 men It is a purely laudatory exaggeration *

* See Bhaṣya on Mn III 37 cited in Brāhma vivaha

30. The father or the guardian who gives the girl in marriage according to the Ārṣa-vivāha gains merit for himself and for the girl We read in Vi (XXIV-34) "(He who gives a girl in marriage) according to the Ārṣa rite (brings her) into the world of Viṣnu (and enters that world himself) "

31. Because this form of marriage is considered as praiseworthy on account of the fact that it is not based on purchase but on sham purchase it takes a high place in the list of the forms of marriage in Ancient India It takes the third place after Brahma, and Daiva in Mn (III 21), Y (159-61), Śankh (IV-2), Vi (XXIV-18) and Vās (I-29) and the second place after Brahma and Prājapatya in G (IV), B I-11, 20), N (XII-38, 39), K (III) and Kām (23), it takes the second place after Brahma in Āp (III-5, 12) and the fourth place after Brahma, Daiva and Prajapati in Āśv Gṛh (I-6)

The Ārṣa-vivaha is considered as an orthodox form of marriage *

This form of marriage is known in all the Smṛtis We find it Mn Y, G, B, N, Āp, Vas, Śankh, Dev, K, Āśv, Gṛh, Kam, MBh

E Brāhma-Vivāha

The voluntary giving away of the girl to an honourable man after having decked her with ornaments is the Brahma-vivaha

32 In this form of marriage the maiden (daughter, bride, damsel, girl) is given away (Mn III-27, Āp II-5, 11, 17, G IV-6, Vās I-30, B I-11, 20, 2, Śankh IV-4, Āśv I-6 1, Vi XXIV-19, N XII-40, K III-2, MBh XIII-44, Ādi Parva 112, Y I-58, Dev, Samvarta and Vyasa in Vir Sams 847, as well as Brahmapurana and Śankh Likh and Paiṭh in Vir Sams 848) to a suitor (Vās I-30, Śankh IV-4) by her father or more correctly speaking by the person who has authority over her (Mn III-27, Āp II-5, 11, 17, Vas I-30, K III-2, MBh XIII-44, Samvarta in Vir Sam 847) But the Smṛtis have a more explicit description of the person to be taken as husband by the girl and demand that he possess some special qualities If the Smṛtis do not describe exactly the qualities with which the suitor has to be endowed they determine only that he must be a suitable (fit, accomplished, deserving qualified) man (Vi XXIV-19 MBh Ādi Parva 112, Dev Vir Sams 847 Samvarta in Vir Sams 847 Brahmapurāna Vir Sams 848) Those Smṛtis which describe more exactly the qualities of the suitor sometimes demand that the father or the person in authority over the maiden enquire regarding the qualities of the suitor (Āp II-5, 11, 17, B I-11 20 2 MBh XIII 44) These qualities are good (virtuous) conduct (Mn III 27 G IV 6 MBh XIII-44) which

* See below

The giving away of the girl took place after going round the fire three times, and after having pronounced the name gotra (Vyāsa in Vir Sams 848) or after pouring out a libation of water (Vas I-30, Āsv I 6, 1 See Yama in Vir Sams 848)

The purpose of this form of marriage is the performance of the rites that must be performed together (Āp II-5, 11, 17)

33 We have seen from the interpretation of the Ārṣa-vivaha that it requires that the gift given to the father by the suitor be returned to the girl It has been pointed out that this gift constitutes a dowry and *that the dowry is the essentiale of the orthodox forms* of marriage to which the Ārsa vivaha belongs

The Brahma-vivaha like the Daiva-vivāha and the Prājapatya-vivaha belongs to the orthodox forms of marriage In the case of these three forms contrary to the Ārṣa-vivaha the obligation to give a dowry is clearly expressed So we may say that the bestowal of the dowry is the essential point in these three orthodox forms of marriage (Brahma Daiva, Prājāpatya) and that they and the Ārṣa-vivāha are the highest and the most esteemed forms of marriage

In Mn we find the reason why it is good to give a dowry to a girl We read in Mn III-56 that "Where women are honoured, there the gods rejoice, where on the other hand they are not honoured there all rites are fruitless" Bhāṣya the commentator of Mn (on Mn III-56) explains that a girl is honoured by the giving of gifts (see also Bhaṣya on Mn III-54) The same passage is to be found in MBh (XIII-46, 5 6)

We read also in Mn "The houses where female relations are not duly honoured, are accursed, they perish completely, as if destroyed by magic Hence men who seek (their own) welfare, should always honour women on holidays and festivals with (gifts of) ornaments clothes, and dainty food In that family, where the husband *is pleased with his wife and the wife with her husband, happiness* will assuredly be lasting ' (Mn III-58-60, similarly MBh XIII-46, 7, 15) We find the full explanation of the necessity of giving a dowry in the next *slokas* of Mn (III 61 62) and in MBh (XIII-46-4 which reproduces the words of Mn) ' For if the wife is not radiant with beauty, she will not attract her husband, but if she has no attractions for him no children will be born If the wife is radiant with beauty the whole house is bright, but if she is destitute of beauty, all will appear dismal "

34 In this form of marriage the girl is given no part in the choice of the man, because this choice depended on the will of the father or guardian only The initiative for the marriage lay with the father or guardian and not in the hands of the suitor Herein we find the greatest difference between this form of marriage and the

Prajapatya-vivāha* Probably the participation of a priest in this form of marriage was not necessary in order that the marriage should be valid, because the final act of the delivery of the girl to the suitor by the father or guardian completed the marriage Possibly the execution of some ceremonial acts completed the marriage In Ancient Germanic Law the case was nearly the same

35 Because this form of marriage is considered praiseworthy (Āp III-5, 12, 3) it is considered also lawful (धर्म्य) and righteous for the Brahma caste (G IV-14, B I-11, 20, 10, N XII-44, Vi XXIV-27, Kam 23, MBh Ādi Parva 73 and XIII-44 Pañc IO 2526 see Śankh IV-3)

According to Mn (III 23) which source of law gives some theories on this subject, two expressions may be found i e that this form of marriage is lawful for and commanded (approved for) for a Brahmaṇa (III-24), as Mn gives the point of view of many law-teachers on this subject According to Banerjee (The Hindu Law of Marriage and Stridhana, being the Tagore Law Lectures for 1878 p 79) this form is called the Brahma form because it is the form peculiarly fit for Brāhmaṇas But it must be noted that according to MBh (Ādi Parva 73) this form of marriage is proper also for Kṣatriyas

36 Sons born in this form of marriage are endowed with Brahmanic glory and are respected by cultured person Endowed with beauty and the quality of goodness, they possess wealth and fame and with full enjoyment and righteousness they live for a hundred years (Mn III-30, 40, Yama in Vir Sams p 865, see B I-11, 21, 1, Āp II-5, 12, 4)

A son born of a wife married according to this form saves or purifies (liberates from sin) twenty-one men (Vi XXIV-29, Y I-58) i e ten ancestors ten descendants and himself as the twenty-first (Mn III-37, G IV-33) and according to Āśv Gṛh (I-6, 1) and Saunaka (Vīr Sams p 863) twelve descendants and twelve ancestors on both sides (the husband s and the wife's side)

Medh on Mn III-37 adds very correctly that 'this verse is a purely laudatory exaggeration Hence the question need not be raised how a man can save from sin his descendants, who are not yet born For ancestors freedom from sin is actually brought about by the proper performance, by the son, of *Śrāddha* and other rites All that the assertion that 'he absolves from sin ten descendants" means is that in his family ten lines of descendants are born sinless

37. Also the father or the guardian who gives the girl in marriage according to this form gains merit for himself and for the girl. Therefore we read in Vi XXIV-33 he who gives a damsel in marriage according to the Brahma rite brings her into the world of

* See Dr A S Altekar s "The Position of Women in Hindu Civilisation" p. 53.

Brahman (after her death, and enters that world himself)". It is the highest and the best world.

38. This form of marriage is considered in all the Smṛtis as the highest of all and always takes the first *place* in the list of the forms of marriage (Mn III-21, Y I-59 61, Śankh IV-2, Vi XXIV-18, Kām 23, K III, G IV, B I-11, 20, Aśv. Gṛh I-6, Āp III-5, 12, Vas. I-29)

The Brāhma-vivaha is known to all the Smṛtis which deal with the forms of marriage (Mn, Y, Vi, G, B, N, Āp, Vās, Śānkh, Dev, Samvarta, Vyāsa, Paiṭh, K, Kam, Aśv, Gṛh, MBh, Brahmapurāna etc).

F. Daiva-vivāha

39. To give a girl to a *ṛtvij*, while he is officiating at a sacrifice constitutes the Daiva-vivâha

According to this form of marriage one* gives away the girl (Mn III-28, Vās I-31, Āp II-5, 11, 19 G IV-9, B I-11, 20, 5, Śankh IV-4, Āsv I-6, 2, Vi XXIV, 20, N XII-41, K III-2, Y I-59, Dev and Yama Vir Sams 849) decked with ornaments (Mn III-28, G III-9, Vas I-31, Aśv I-6, 2, Mit to Y-I-59), (the text does not mention that the ornaments must be given to the girl Bāl adds that the words from Mn III-28 *i e* from the Brâhma-vivâha "decked with ornaments, according to his ability" should apply to all kinds of marriages" Similarly B I-11, 20, 5, Dev Vir Sams 849) *i e* duly decked (Aśv I 6, 2) with gold (Dev Vir Sams 849), to an officiating priest *(ṛtvij)* (Mn III-28, Āp II-5, 11, 19, G III-9, Vās I-31, B I-11, 20, 5, Sankh IV-4, Āsv I-6, 2, Vi XXIV-2, N XXIV-2, XII-41, K III-2, Kam 23, Y I-59, Dev Vir Sams 849, Yam in Vīr Sams 849), while he is officiating at a sacrifice (Mn III-28, Āp II-5, 11, 19, Vas I-31, B I-11, 20, 5, Śankh IV-4, Āsv I-6, 2, Vi XXIV-20, K III-2, Kam 23, Y I-59) †

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* According to Dr A S Altekar (The Position of Women in Hindu Civilisation) it is the sacrificer (p 53)

† Dr A. S Altekar in his 'Position of Women in Hindu Civilisation' says 'Vedic sacrifices, which were quite popular down to the 4th century B C., often lasted for several weeks The sacrificer had to invite a large number of priests to perform various duties in their connection. During this close and prolonged association, he would often be favourably impressed by the culture, education and attainments of some one among the priests, and would decide to solve the marriage problem of his grown-up daughter by offering her to him These were the days of post-puberty marriages, owing to the close association during the sacrifices daughters also could get an opportunity to form an estimate of their future husbands and guide their parents in the choice Daiva marriages disappeared with Vedic sacrifices Later tradition has not preserved any instances of the earlier period The case recorded in the Bṛhaddaiva is not really an instance of this marriage, for there the sage Śyāvāsva does not himself marry the sacrificer's daughter but selects her for his son (V, 54-55)" (p 53-54.)

According to Āp (II 5, 11, 19) it must be a *srauta*-sacrifice, according to Āsv (I-6, 2) a sacrifice with three *srauta*-fires, and according to Bal, commentator on Y (ad Y I-59) and Bhasya on Mn (III 28) a big sacrifice like *Jyotiṣṭoma*

This form of marriage differs little from the Brâhma-vivâha (instead of a suitor having some special qualities he is here an officiating priest at the moment at which he is officiating at a sacrifice) This can be well understood after the commentaries of the Smrtis have been studied

According to Bāl (*ad* Y I-59) 'when a person commences the performance of any big sacrifice, like *Jyotiṣṭoma* etc, he may give his daughter in marriage to the officiating priest, in consideration of his finishing the sacrifice, which may last for several days'

Therefore we can admit as rightly said that the giving of a girl to the *ṛtvij* is in consideration of his fee (Bāl ad Y I 89, Mit ad Y I 89) The girl is given as part of the sacrificial fee (दक्षिणा) to one of the priests after a sacrifice has been completed Gov, commentator on B (S B E XIV ad B I-11, 20, 5) adds that the recipient has to accept the gift with the six *mantras* (प्रजापति स्त्रियां यश .) Taitt Brâhm III-4, 6, 5)

It must be pointed out that according to Dev (Vir Sams 849), the Daiva-vivâha takes place 'when the girl is given within the altar to the bridegroom after having presented to him a pair (a cow and a bull)" It is evident that Dev was mistaken and that the form of marriage described in such a manner in Dev is not the Daiva-vivaha but the Ārṣa-vivaha

Moreover, according to Jolly in Hindu Law and Custom (p 116) 'The sacrificial priest is, as is often the case, inferior in position to a virtuous and learned Brahman, on the other hand his position is raised at the moment at which he is engaged in a sacrifice just as the murder of a man in the act of performing a sacrifice is a still more heinous crime (Vi 50, 7) '

40 In the Daiva-vivāha which also belongs to the orthodox forms of marriage the girl as in the Brahma-vivaha had no influence in the choice of her husband, this choice depended on the will of the father or guardian The participation of a priest in this form of marriage was probably not necessary and it is certain that the participation of a priest was not an *assentiale negotii* in the matrimonial act, because the act of the delivery of the girl to a *ṛtvij*, actively engaged in sacrifice was tantamount to marriage, although it is possible that it was necessary to execute a ceremony such as *saptapadi* (seven steps) This form of marriage is therefore very similar to the ancient Germanic forms of marriage, where the participation of a priest was not necessary for the validity of the marriage

41. Because this form of marriage is considered as praiseworthy (Āp III-5, 12, 3) it is considered also as lawful (धर्म्य) and righteous for the Brahma caste (G IV-14, B I-11, 20, 10, N XII-44), Vi XXIV-27, Kam 23, MBh. Ādi Parva 73 and XIII-44, see Śankh IV-3 Pañc 10, 2526) According to Mn III 23 which source of law gives some theories on this subject, two opinions may be found i e that this form of marriage is lawful (for a Brahmaṇa) and commended (approved for) for a Brahmana (III-24) Mn gives the point of view of many law-teachers on this subject According to MBh (Ādi Parva 73) this form of marriage is proper for the Brahmaṇas and Kṣatriyas

42. The sons born in this form of marriage are endowed with Brahmanic glory and are respected by cultured persons Endowed with beauty and the quality of goodness, they possess wealth and fame with full enjoyment and righteousness and they live for a hundred years (Mn III-39-40, Yama in Vir Sams p 865, see B I-11, 21, 1, Āp II-5, 12, 4)

A son born of the wife married according to this form of marriage saves 7 men i e three ancestors and descendants and himself (Śankh in Likh Vir Sams p 865) according to G (IV-31) ten ancestors, according to Vi (XXIV-31) and Y (I-59) fourteen men, and according to Āśv Gṛh (I-6, 1) and Śaunaka (Vir Sams p 863) ten ancestors and ten descendants altogether twenty persons Śaunaka (*ibidem*) adds that the purified persons may belong to the father's or mother's side *

43. Also the father or the guardian or he who gives the girl in marriage according to the Daiva-vivaha gains merit for himself and for the girl We read in Vi (XXIV-34) "(He who gives her in marriage) according to Daiva rite (brings her) into *svarga* (or heaven) (and enters *svarga* himself) "

44 This form of marriage generally takes the second place after Brahma in the list of the forms of marriage in Ancient India (Mn III-21, Y I-59 61, Śankh IV-2, Vi XXIV-18, Āsv Gṛh I 6 and Vas I-29) According to Āp this form of marriage takes the third place after the Brahma-vivaha and the Arṣa vivaha, and according to Kām (23) K, (III), G (IV) B (I-11-20) and Nar (XII-38-39) the fourth place after the Brahma-vivaha, Prajāpatya vivaha and Arṣa-vivaha.

The Daiva vivāha is known to all the Smṛtis which deal with the forms of marriage (Mn, Y, Vi G B, N, Āp, Vas, Śankh, Dev, Yama, K., Kām, Āśv Gṛh MBh)

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* See Bhāṣya on Mn. III-37

G. Prājapatya-Vivāha*

45. The giving of a girl to a suitor by saying that they shall perform together their duties is the Prājapatya-vivaha

According to this form of marriage the father or he who has authority over the girl has to give away the girl (Mn III-30, B I-11, 20, 3, Śankh IV 5, Y I 60, K III-2, Dev Vir Sams 851) to a suitor i e to a person who solicits her hand (Mn III 30, Śankh IV-5, Vi-XXIV-22, N XII-40, Y I-60) by saying a formula such as 'may both of you perform together your duties' (Y I 60, Mn III-30, G IV-7, B I 11, 20, 3, Āsv I-6, 3, N XII-40, K III-2, Kam 23, Dev Vir Sams 851) This formula must express in a sentence that the husband and the wife have to co operate in the performance of their duties According to Bâl (*ad* Y I-60) this form of marriage is meant for monogamous couples only A person married by this rite of Prâjâpatya, cannot take another wife, during the lifetime of his first wife This is the force of the marriage address "may *both* of you perform *together* your duties 'In other forms of marriage, the married couple should perform their duties together, but in this form they are specially enjoined to observe their duties to each other, so that the husband cannot renounce his wife and take to the order of *sanyasa* or *vanaprastha*,† nor can he take another wife, as long as she lives (Nṛsimha and Haradatta *ad* G IV-7) This is also the opinion of Har, commentator of Gaut (*ad* IV-7) ‡ According to B (I-11, 20, 3) and Dev (Vir Sams 851) the girl has to be decked with ornaments as in the other forms of marriage (See also Mn III-III-30)

The difference (which appears from the texts) between this form of marriage and the Brâhma vivâha is as follows in this form of marriage contrary to the Brahma-vivâha, the bridegroom is the suppliant and is not invited by the father of the bride The Prâjapatya Vivaha was probably used only for a monogamic marriage

46 According to Gooroodass Banerjee, The Hindu Law of Marriage and Stridhana (being the Tagore Law Lectures for 1878), in this form of marriage the bridegroom is an applicant for the bride s hand That is the distinction of this form from the Brahma, and makes it inferior to the latter in which the bridegroom is voluntarily invited by the father to accept the bride Marriage being according to Hindu notions a gift loses a portion of its merit if the gift is not voluntary but has to be applied for' Dr A S Altekar in his 'The Position of Women in Hindu Civilisation comes to an unfounded conclusion that the Brāhma and Prajapatya are synonymous words

tical with the Prajapatya one This conclusion is supported, according to Dr A. S Altekar, by the fact 'that two of the early writers, Vasiṣṭha and Āpastamba, do not mention Prājapatya marriage at all, they refer to only three approved forms, Brahma, Daiva and Ārṣa Prajapatya was added later, probably to make the number of the forms of marriage eight Smṛti writers therefore naturally fail to bring out the difference between the two '

47 In this form of marriage called also Kaya vivaha the delivery of the girl to the wooer by the father or guardian was probably held to be equivalent to the wedding ceremony (similar to the Ancient Germanic Law), so that it was not necessary to perform a further ceremony in the presence of a priest The Prājapatya-vivaha also belongs to the orthodox forms of marriage

48 This form of marriage is considered as lawful (धर्म्यं) and righteous for the Brahma caste (G IV 14, B I-11, 20, 10, N XII 44, Kam 23, Vi XXIV 27, MBh Ādi Parva 73, Panc IO 2526, see Śankh IV-3) According to Mn. III-23 which source of law gives some theories on this subject, two opinions may be found i e that this form of marriage is lawful (for a Brahmaṇa) and commended (approved for) for a Brahmaṇa (III 24), as Mn gives the point of view of many law-teachers on this subject According to MBh (Ādi Parva 73) this form of marriage is proper for a Brahmaṇa and Kṣatriya

In another place MBh (Ādi Parva 73) states that this form of marriage is improper Probably this is only a point of view of one author who does not know the importance of this form of marriage

49 The sons born in this marriage are endowed with Brahmanic glory and are respected by cultured persons Endowed with beauty and the quality of goodness they possess wealth and fame with full enjoyment and righteousness and live for a hundred years (Mn III 39 40, Yama in Vir Sams p 865, See B I-11 21 1, Ap II 5, 12, 4)

A son born of a wife married according to this form of marriage saves four ancestors from hell (Vi XXIV-32) According to Y six men as well as himself (Y I 60), according to G (IV 32) ten persons, according to Mn (III 38) twelve persons i e six ancestors, and six descendants according to Sankh Likh (Vir Sams p 865) fifteen persons i e seven ancestor and seven descendants and himself, and according to Āśv Gṛh (I 6) and Saunaka (Vir Sams p 864) sixteen persons i e eight ancestors and eight descendants It is also a purely laudatory exaggeration *

50 Also the father or the guardian who gives the girl in marriage according to the Prajapatya vivaha gains merit for himself and for the girl We read in Vi. (XXIV-36) (He who gives a girl in mar-

* See Medhatithi's commentary on Mn. III 3"

riage) according to the Prajapati rite (takes her) into the world of the gods (and enters that world himself)

51. This form of marriage usually takes the fourth place in the general list of the forms of marriage in Ancient India (Mn III-21, Y-I-59 61, Śankh IV-2, Vi XXIV-18) i e *after the Brahma,* Daiva, and Arṣa, but also takes the second place after the Brahma (K III, G IV, B I-11, 20, N XII-38, 39) and the third place after the Brahma and Daiva rites (Āsv Gṛh I-6)

The Prajapatya vivāha is known to all the Smṛtis with the exception of Āp and Vās which deal with the forms of marriage (Mn, Y, Vi, G, B, N, Śankh, Dev, K, Kām, Āsv Gṛh)

II. Gandharva-Vivaha

52. *The union of a willing maiden and a lover constitutes the* Gandharva-vivaha

This form of marriage is a voluntary (or spontaneous) (Mn III-32, K III-2, Kām 26 G IV-10) union (सयोग) (Mn III-32, Āp II-5, 12, 20, G IV-10, B-I, 11, 20, 6, Śankh IV-6, Vi XXIV-23, N XII-42, K III-2, Kam 26, Dev Vir Sams 855) of a loving (willing) (G IV-10, Vas I-33, B I-11, 20, 6, N XII-42) maiden (bride, virgin (कन्या) damsel, woman) (Mn III-32, Āp II-5, 12, 20, Vas I-33, B I-11, 20, 6, Śankh IV-5, Āśv I-6 5, N XII-42, K. III 2, Dev (Vir Sams 855, Har Vir Sams 856) and her lover (bridegroom) (Mn III-32, Āp II 5, 12, 20, G IV-10, Vas I 33, B I-11, 20, 6, Śankh IV-5, Āsv I 6, 5, N XII-42, K III 2, Dev Vir Sams 855, Har Vir Sams 856), or as Vi (XXIV-23) expresses himself, a union between two lovers constitutes this form of marriage Āśv (I-6, 5) adds that this form of marriage takes place after a mutual agreement has been made Similarly Dev (Vir Sams 855) This mutual consent or reciprocal attachment is the *essentiale negotii* of this form of marriage, according to Y (I-61) For the better understanding of this form of marriage some Smṛtis add that this form of marriage takes place through love (Āp II-5, 12, 20, Śankh IV-5, Dev Vir Sams 855), or that it springs from desire and has sexual intercourse for its purpose (Mn *III-32) According to Vas the lover has to take (Vas I-33) a girl* of equal caste (Vas I 33) according to Vi (XXIV-23) without the consent of mother and father and according to Dev (Vir Sams 855) to a sacred place

Nar and Go (*ad* Mn III-32) enter into a discussion of the question whether the prescribed offerings and wedding ceremonies are to be performed in the case of the Gândharva vivâha, Râkṣasa-vivâha and Paiśâca vivâha Relying on a passage of Devala and of the Bahṛka Gṛhyapariśiṣṭa (Saunaka) we find that the *homas* must be performed at least in the case of Aryan couples But they hold

with Manu's *dictum* (VIII-226) which restricts the use of the *mantras* to women, married as virgins saying that the Vedic nuptial texts must not be recited From the comment of Medh on verse 34 it would appear that opinions on the subject were divided, and that some held weddings with the recitation of *mantras* to be permissible while other denied the necessity of any wedding

Bāl (ad Y I 61) says that in the case of the Gândharva and other rites of marriage, in order to constitute the legal status of husband and wife, the ceremonies of *Homa* and all the rest up to *Saptapadi* must be performed According to some texts the Gandharva-vivaha was a marriage which was consummated before the due performance of the sacred rituals

In this connection I should like to quote the definition of this form of marriage which we find in Kām (Part 3 Ch 5) We read there "when a girl who has been courted by a young man and is entirely his, he behaves towards her in public as if she were his wife He obtains consecrated fire from a Brahman, strews the ground with holy grass, makes on oblation before the fire, and is married according to the religious regulations relative to this form of marriage There are no witnesses After the ceremony the man informs the girl's parents of the accomplished fact Such a marriage before consecrated fire in indissoluble All the other relations are also advised and their consent solicited This is the ceremony of the Gandharvas '

From this it may be seen that the marriage of the Gandharvas is a form of concubinage till the formal wedding ceremony, which takes place without the consent of the girl's parents (See Vi XXIV-23) For instance in Pancatantra (Textus Ornatior, eine Altindische Maerchensammlung uebersetzt von Richard Schmidt, Leipzig, Lotus Verlag, Buch I, Erz 8) we read that sexual intercourse with a married woman (adultery) is "a marriage contracted according to the Gândharva-rite" (Similarly Pancat ibid II-5) In the Ancient Indian Literature we can find many such examples

53. Quite a different point of view is to be found in MBh (XIII-44) where we read "When the father of the girl, *disregarding his own wishes*, bestows his daughter upon a person *whom* the daughter *likes* and *who reciprocates* the girl's sentiments, the form of marriage, O Yudhiṣṭhira, is called Gandharva by those that are conversant with the Vedas" We see that according to MBh it was a real form of marriage, it was one of the highest forms of marriage, where the father (guardian) had no influence in the choice of a husband for the girl

In Mn III-26 we find the following sentence

पृथक्पृथग्वा मिश्रौ वा विवाहौ पूर्वचोदितौ ।
गान्धर्वो राक्षसश्चैव धर्म्यौ क्षत्रस्य तौ स्मृतौ ॥

"The Gandharva and the Rakṣasa, the two vivahas mentioned above have been declared to be lawful for the Kṣatriyas whether separate or combined" (identically MBh Adi Parva 73, 12, 13)

We can see from this sentence that there exist two sub-divisions of this form of marriage i e the Gāndharva-vivaha combined with the Rakṣasa vivaha and not combined with this form of marriage i e a "separate Gandharva-vivaha"

A fine explanation of the Gandharva-vivaha combined with the Rakṣasa vivaha* can be found in Medh 's commentary on Mn III-26, where we read "A girl living in her father's house, happens to see a boy living in the same house and having heard praises from messengers, falls in love with him, but not being mistress of herself she cannot meet him,—and then she enters into a compact with her lover, requests him to take her away by some means or other, and gets herself carried away, the bridegroom, being possessed of great strength, carries her away after having killed and wounded' (her guardians) Now in this case, since there is 'voluntary union bet ween the two' it fulfils the conditions of the 'Gandharva' form, while, since he has carried her away, after having killed and wounded', the conditions of the *'Rakṣasas' form are also fulfilled'* Such a Gāndharva vivaha combined with the Rakṣasa-vivaha (a blameworthy Gandharva-vivaha) is nothing but a specific form of the *Rakṣasa-vivaha and has to be interpreted according to the rules pres-*cribed for the Rakṣasa vivaha (See in the Bhāgavata Purana the story of the marriage of Rukmiṇi)

On the other hand we find quite a different form of marriage called also Gandharva-vivaha (separated from the Rakṣasa-vivaha, a separate Gandharva vivaha) It is this form of marriage which we find in MBh XIII-44† *and which has to* be considered as one of the highest forms, where the father (guardian) had no influence in the choice of the bridegroom for the girl

Concerning the first kind of Gandharva vivaha we find the following sentence in the Hindu Law of Marriage and Stridhana being the Tagore Law-lectures for 1878 by Gooroodass Banerjee p 85, although this author does not mention the division of the Gandharva vivaha into two sub divisions 'Marriages in this form, which depend merely upon the agreement of the contracting parties, resemble to some extent what are called Gretna Green marriages—that is runaway marriages by persons governed by the English law, at Gretna-Green and elsewhere in Scotland to evade the provisions of the law against ill advised and clandestine marriages' This kind of the Gandharva-vivaha was *contracted 'for the purpose of amorous em-*

* It is a blameworthy form of marriage but must not always be mixed with the Rakṣasa-vivaha

† See above para 53

braces proceeding from sexual inclination" (John D Mayne A Treatise on Hindu Law and Usage, Madras 1900 par 79)

The second kind of the Gandharva-vivaha was contracted for the happiness of the girl and was a real marriage in which the consent of the father was not an *essentiale negotii* But the father (guardian) of the girl was obliged—irrespective of whether the suitor was convenient to him or not to bestow the daughter He had to act only for the happiness of his daughter and not to look for his own advantage

If the Gandharva-vivaha is divided into these two forms of marriage which division is based on the lawful texts (Mn III-26, MBh Ādi Parva 73-12, 13) we can understand the contradictory conception and rules of the Gandharva-vivaha, for example the rules concerning the admissibility of this form of marriage to members of different castes etc

54. Concerning the 'blameworthy Gāndharva-vivaha" it has to be pointed out that this form of marriage should be avoided according to Mn (III-42) and Yama (Vir Sams p 865) because it is a "blameworthy marriage"*

From this marriage blameworthy offspring are born (Mn III-42 Yama, Vir Sams p 865)

This kind of the Gandharva-vivaha is fit for the Kṣatriyas, Vaisyas and Śudras (Mn III-23) and according to other sources of law permitted to the Ksatriyas (Mn III-26, MBh Ādi Parva 73, Vi XXIV-27, B I-11, 20, 12, Pañc IO. 2526 See Śankh IV-3)

The second kind of the Gandharva-vivāha i e the Gandharva vivaha separated from the Rakṣasa-vivaha is lawful for members of the Brāhma caste (Mn III 23, 25, N XII-44, G IV-15) † On account of the general character of this form of marriage, based on love, which does not know any caste differences some recommend the Gāndharva-vivaha for all castes (B I-11, 20, 16, N XII-44)

This is not all, contrary to the blameworthy Gandharva-vivaha he who marries according to the Gandharva-vivaha not combined with the Rakṣasa-vivaha will go to the world of Gandharvas (Vi XXIV-37)

55. According to the sources of law we may say that the 'blameworthy Gandharva vivaha" was the rule, and that is the reason that the Gandharva-vivaha takes a low place in the list of the forms of marriage It takes the first place after the orhodox forms of marri-

* See paragraphs 6-11 (Rakṣasa-vivaha)

† The sources of law say "some say that " (Mn. III-23, G IV-15) Another proof that there are two kinds of the Gandharva-vivaha

‡ It is another example for the high position of this form of marriage although from the Indian view-point it was rather a humilation

age i e. the fourth* place in the general list of the forms of marriage *according to Ap. (III-5, 12)* (after the Brāhma, Ārṣa and Daiva) and Vās (I-29) (after the Brāhma, Daiva and Ārṣa) and the fifth place according to G. (IV). B (I-11, 20), N. (XII-38, 39), K. (III) (after the Brāhma, *Prājāpati, Ārṣa and Daiva)* and *Āśv-Gṛh. (I-6)* (after the Brāhma, Daiva, Prājāpatya and Ārsa). According to other sources it takes the second place after the orthodox forms of marriage i e. the sixth *place in the general list of the forms of marriage* according to Mn (III-21), Y. (I-59-61). Śānkh (IV-2), Vi. (XXIV-9) (after the Brahma, Daiva, Ārsa, Prājāpati, and Āsura).

This form of marriage is known to all the sources of law.

I. Svayamvara

56. Svayamvara is the self-choice

We know the festive Svayamvara which we find in Ancient *Indian literature and the ordinary Svayamvara, which we find in the* Smrtis

Three kinds of festive Svayamvara may be distinguished The Svayamvara of Sâvitrî is a unique instance of the absolute freedom of a princess to choose her husband Alone Sâvitrî travels through various countries in quest of a husband and at last meets Satyavân *But it is hardly probable that a princess of a proud and noble family* already shackled by fetters of long standing tradition should be allowed to proceed in this way and Hopkins is very probably right *when he says that this was the earliest form of Svayamvara (JAOS* XIII, 168 f f, 357 ff) Another form of Svayamvara is that the bride is viryaśulkā i e she is to be won by a feat of prowess as in the case of Sitā and Draupadi The usual form is well-known but it is hardly possible that the bride could follow her own inclinations in a festive gathering dominated by her father (Jolly. Hindu Law and Custom p 111)

This festive Svayamvara has always been a favourite theme, eagerly utilised by poets That Svayamvara is well-known specially from the episode of Nala and Damayanti † It is also known in Rāmayana (Rāma gets Sitā), Mahabhārata (Arjuna gets Draupadi), Puraṇas, Raghuvamça, Vikramānkadevacarita of Bilhana, Vatsyayana and others

In the case of a festive Svayamvara—as described in the epics —the father of a marriageable princess arranges that princes of his own standing should present themselves at the Svayamvara of his

* [illegible] one of the orthodox forms of marriage (Prajapati)

† [illegible]

daughter and in the festive assembly the patumvarâ as a sign of her choice puts the garland round the neck of the chosen bridegroom A fine example of a festive Svayamvara can be found in the story of Nala and Damayantî We read there

"When the lord of earth his daughter saw in blooming youth mature,
Knew he for the Svayamvara Damayanti's time was come
'Straight the lord of many peasants summoned all the chiefs of earth,
" 'Come ye to the Svayamvara all ye heroes of the world!'
"Damayanti's Svayamvara, soon as heard the kings of men,
"All obeyed king Bhîma's summons, all to Bhima's court drew near,
"Elephants, and steeds, and chariots, swarmed along the sounding land ,
"All with rich and various garlands, with his stately army each,
"All the lofty minded Râjas, Bhîma with the arm of strength,
"As beseemed received with honour, on their thrones of state they sat "

'Came the day of happy omen, moonday meet, and moment apt ,
"Bhima to the Svayamvara summoned all the lords of earth,
'Once and all, upon the instant rose the enamoured lords of earth,
'Suitors all to Damayantî in their loving haste they came
"They, the court with golden columns rich, and glittering portal arch,
"Like the lions on the mountains entered they the hall of state
'There the lords of earth were seated, each upon his several throne,
"All their fragrant garlands wearing all with pendant ear-gems rich
'Arms were seen robust and vigorous as the ponderous battle mace,
'Some like the five headed serpents delicate in shape and hue
"With bright locks profuse and flowing, fine-formed nose, and eye and brow
'Shone the faces of the Rajas like the radiant stars in heaven
"As with serpents, Bhogavatî, the wide hall was full of kings ,
"As the mountain caves with tigers, with the tiger warriors full
'Damayanti in her beauty entered on that stately scene
'With her dazzling light entrancing every eye and every soul
O er her lovely person gliding all the eyes of those proud kings ,
'There were fixed, there moveless rested, as they gazed upon the maid

"And of right king Bhima s daughter named Nishadha s lord

"Modestly the large-eyed maiden lifted up his garment's hem,
"Round his *shoulders threw she lightly the bright zone of radiant* flowers
"So she chose him for her husband, Nala, that high-hearted maid".
(Story of Nala, Book II)

57. But this festive Svayamvara is quite different from ordinary Svayamvara, which, correctly speaking is not a special form of marriage In some cases the girl has the right to choose a husband *for herself* For this reason the Svayamvara is closely connected with the Gândharva-vivâha

The ordinary Svayamvara takes place when the maiden has attained her puberty After a period has passed, the maiden can choose a bridegroom for herself

According to this form of marriage if the maiden has passed her monthly periods (Mn IX-90, B IV-1, 14, Vi XXIV-40, G XVIII-20, *Vas XVII 67) expressed in the Smṛtis (Mn IX 90, B IV-1, 14, Vi* XXIV-40, G XVIII-20, Vas XVII 61) after having attained puberty (Mn III-90, B IV-1, 14, Vas XVII 67) and if her father (and in his absence he who has the right to give her in marriage *i e* the guardian) has not married her during this period (Y-I-64, G XVIII-20) she may choose a bridegroom (Mn IX-90, Y-I 64, B IV-1, 14, Vi XXIV-40 G XVIII-20, Vās XVII-68) for herself (Mn IX 90, Y-I-64, B IV-1, 14, Vi XXIV-40, G XVIII 20, Vas XVII-68)

This period of time which has to pass after the maiden has attained puberty is either one of three years (वर्ष) (Mn IX-90, B IV-1, 14, Vas XVII-67) or of three monthly periods (ऋतु) (Vi XXIV-4, G XVIII 20) The difference in the duration of time is undoubtedly great According to Nand the commentator of Vi. the expression ऋतु can be used as वर्ष and vice-versa It does not seem that Nand is right Probably the expression ऋतु is better and in ancient times it was sufficient that the girl received the right of self choice if she was not married by her guardian during the first three monthly periods The first duty of the young couple was to bear children Therefore immediately *after the monthly period the* (ऋतुगमन) *(coitus)* had to take place This was of great importance for the marriage and therefore the space of time of three monthly periods was completely sufficient Only with great liberality was it possible for the later commentators to extend this period

The man in this case to be chosen by the girl must be a proper man or a blameless man or a man of equal caste and rank Y-I 64, G XVIII-20, Mn III 90 Vās XVII 67) But this rule is, of course a *lex imperfecta although we find in the Smṛtis such a sentence* "The maiden, though marriagable should rather stop in (the

father's) house until death than that ever be given to a man destitute of qualities" (Mn IX-89) This last sentence is based on the principle that a girl should be given in marriage before puberty to a man who has not broken the vow of chastity (B IV-1, 11), who possesses good qualities (B IV-1, 11, Śatatapa-Vir Sams 755), good character (Lalla and G-Vir Sams 754, B IV-1, 11 Śatatapa-Vir Sams 755), family (Yama, G, Lalla-Vir Sams 754, Śatatapa-Vir Sams 754), age (Yama-Vīr Sams 754, Lalla-Vīr Sams 754, Śatatapa-Vīr Sams 755), beautiful body (Yama-Vir Sams 754), learning (G, Yama, Lalla-Vir Sams 754, Śatatapa-Vir Sams 755), presence of guardians (Yama and others-Vir Sams 754, 755), health (Lalla-Vir Sams 754, Śatatapa-Vir. Sams 755), wealth (Lalla-Vir Sams 754) etc

But if a girl has to choose a bridegroom after reaching puberty she is not without defects and for that reason it is not probable that she will find herself a proper bridegroom Only B (IV-I, 14) admits, therefore that "if no man of equal rank is available i e one who has not the qualities mentioned above, the maiden may even take one destitute of good qualities (identically Nilakaṇṭha)

If the girl acts in such a manner she incurs no guilt (Mn IX-91, Vi XIV-40) because if he whose duty it is to marry the girl fails to give her in marriage he incurs the sin of killing the embryo at every menstruation (Mn I-64) But the maiden who chooses a man for herself shall not take with her any ornaments given by her father or her mother or her brother If she carries them away it will be a theft (Mn III 92, G XVIII-20)

On the other hand the man who has been chosen in such a manner will never pay a fee to the father of the girl because through his negligence the father loses his authority over the daughter That is also the reason for which the Brahmans do not count the ordinary Svayamvara among the forms of marriage

That is the description of the ordinary Svayamvara in the Smrtis Very interesting are the rules concerning the ordinary Svayamvara in the Kâmasûtra (Ch IV § 29) We read there that the girl has to choose a man whom she loves and that she has to try to make him fall in love with her She has to show herself to him, to come with flowers, perfumes and betel to his house in the evening, she has to show him her accomplishment in the arts, in massage in the touch of his head, she has to narrate stories to him and to act according to the rules contained in Chapter III § 26 of Vâtsyâyana's Kâmasûtra, If he desires to kiss her, she must only allow him to do so by force, and if he desires to have sexual intercourse with her she must allow him touch the योनि only with great difficulty If she is kissed she must not show that

she is satisfied by it and yet if she falls in love she must never act in a manner that would enable him to perceive it (Compare Yaśodhara to Vâtsyâyana's Kâmasûtra Ch III § 26)

J. Legal Consequences of the Forms of Marriage

58. The above-mentioned forms of marriage are more or less systematically tabulated in the sources although some authors deviate from this order There is however, a certain stability in the system where these forms of marriage are concerned It is obvious from the general list of the forms of marriage according to the sources of law that Mn, Y, Vi, and Śankh show the same methodical disposition in the system of the forms An almost identical order, is to be found in B, G, N, K and Kam while we meet with special orders in Ap, Vas and Asv Grh One absolute regularity may be observed in all the Ancient Indian Sources that is Brahma, Daiva, Ārṣa and Prajapatya vivahas occupy the first four places and Asura, Gandharva, Rakṣasa and Paisaca vivahas occupy the next four

This order of the particular forms of marriage in the general list of forms is not insignificant A rule is to be found in three sources, namely in B, Āp and Kam that each preceding form of marriage is better than the following one (Āp II-5, 12, 3, B I-11, 20, 10) and that each succeeding form is more sinful than the preceding (B I-11, 20, 11) as the modes of marriage are given in a descending scale of worthiness (Kam P 3 Ch 5)

59 From the legal point of view it is important to classify marriages according to the form in which they took place as either belonging to the orthodox forms or the other forms That such a division existed may be learnt from the fact that the so called orthodox forms of marriage (Brahma, Daiva, Ārṣa, Prajapatya) always (though sometimes not in the same sequence) occupy the first four places in the general list of the forms of marriage This division is of some importance according to Y and Vi and to a certain extent also according to Mn We read in Vi (XVII-19, 20) as well as in Y (II-145) that if a woman married according to the Brahma, Daiva, Ārṣa or Prajapatya-vivaha (*i e* according to one of the orthodox forms of marriages) dies without issue her property *i e* the Stridhana belongs to her husband and if she was married according to one of the other four rites her father takes it The same point of view is also represented by Mn (IX-196 197) with the sole distinction that the Stridhana belongs to the husband not only in the case of the orthodox forms of marriage but also in the case of the Gandharva-vivaha (probably the Gāndharva vivaha not combined with the Rakṣasa-vivāha) and in the case of a marriage according to the three lowest

rites the property belongs not to the father but to both the parents of the dead woman.

It must be pointed out that K. (III-2) represents the point of view that on principle irrespective of the form of marriage, the Strīdhana if there are no sons belongs to the husband.

60. As far as the use of the Strīdhana is concerned K. makes a difference according to the form in which the marriage took place. It is noteworthy that according to K. the woman should be able to use the Strīdhana if she requires it mainly in the case of her becoming a widow and having no sons. She was further able to make use of the Strīdhana to maintain a son, daughter-in-law or herself should an absent husband have made no provision for her maintenance. The husband might make use of the Strīdhana in the event of calamity, disease or famine, to ward off danger and for charitable purposes. These are exceptional occasions. Another exceptional activity permitted the use of the Strīdhana. It could be used by "mutual consent" by a couple that had brought forth twins. Yet another exceptional case depended on whether the marriage had taken place according to one of the orthodox forms of marriage or not.

There shall be no complaint if the Strīdhana "has been enjoyed for three years by those who are wedded in accordance with the customs of the first four kinds of marriage". Therefore, if the marriage had taken place according to the Brāhma-vivāha, Prājāpatya-vivāha, Ārṣa-vivāha or Daiva-vivāha the married couple were themselves able to agree upon the use of the Strīdhana, but not for longer than three years. If however, the marriage did not take place according to one of the orthodox forms of marriage the couple had no right to such an agreement. In the case of a marriage according to the Gāndharva-vivāha or the Ārṣa-vivāha—they were obliged "to restore the Strīdhana together with interest" and in the case of marriage according to the Rākṣasa-vivāha or Paisāca-vivāha the use of the Strīdhana "shall be dealt with as a theft".*

These are the only cases in all the sources of law in which the form of marriage had legal consequences.

61. Another hard intelligible rule concerning the consequences arising from the form in which the marriage was contracted is to be found in K. (III-2). According to K. if the marriage took place in one of the orthodox forms (Brāhma, Prājāpatya, Ārṣa or Daiva) considered "as an ancestral custom of old", the marriage was valid on being approved by the father, the rest are to be sanctioned by both the father and mother "for it is they that receive the money (शुल्क)

* See details in the author's "Juridical Studies in Ancient Indian Law". 1. Reciprocal Responsibility for Debts Contracted by Married People, Annals of the B.O.R.I. Vol. XXV p. 165-166.

paid by the bridegroom for their daughter' This sentence is quite clear as far as the orthodox forms of marriage are concerned but it is unintelligible in the cases of Gandharva vivaha, Rakṣasa vivaha and Paisaca vivaha, because according to these forms the consent of the father even is unnecessary much less that of the father and mother But it is possible and this rule may be interpreted in such a manner that as far as Āsura vivaha is concerned, in which case both parents receive the money (शुल्क) paid by the bridegroom for their daughter, the consent of both is necessary This interpretation can be based on the argument used by the author of the rule 'for it is they that receive the money paid by the bridegroom for their daughter"

62 In any case it appears from the above considerations that the division of the forms of marriage into 8 or 11 forms has no meaning from the legal point of view and all the forms of marriage may be divided into righteous forms *i e* orthodox forms of marriage (Brahma, Daiva, Ārṣa, Prajāpati with the exception of the only case Mn IX 196|7 also Gandharva) and the blameworthy forms of marriage *i e* the non-orthodox forms of marriage (Gandharva, Āsura, Rakṣasa, Paisaca)

63 It must further be pointed out that according to Āp and B 'the quality of the offspring depends on the quality of the marriage rite' (Āp II 5, 12, 4, B I 11, 21 1) *i e* from praiseworthy marriages virtuous children are born and from blamable marriages bad children (Mn III 39-42) These virtuous children are radiant with knowledge of the Veda and are honoured by the Śiṣṭas

To the first group of children belong those born in orthodox forms of marriage and to the second group those born in non-orthodox forms of marriage

III SOCIOLOGICAL ASPECTS OF THE FORMS OF MARRIAGE

64 All the forms of marriage that we find in the Ancient Indian sources are there described together That is to say that in every source of law we meet simultaneously with all the above mentioned forms of marriage On considering and interpreting the forms of marriage from this point of view it might be maintained hat all the authors consider all the forms of marriage as being in ontemporary use at the time of the validity of the individual mṛtis

After having acquainted *oneself with the problem in question* ais standpoint seems to be wrong In all probability the forms of aarriage had passed through the same evolution in Ancient India as in general they developed elsewhere and in consequence the non orthodox forms of marriage did not exist at the time of the validity

of the above mentioned sources of law though they were known by name, and the rules contained in the Smṛtis were only archaic. Although a marriage might perhaps be contracted in one of the superseded forms it could not be considered legal and the persons who contracted a prohibited marriage of the sort were even punished

65 When we study law from the sociological point of view and consider examples found among the peoples of antiquity and the peoples of the so called lower stage of civilisation we can establish the principal stages of the development of the forms of marriage are as follows

1 marriage by capture,
2 marriage by purchase (or by consideration),
3 marriage based on the choice of a husband by the girl's father independently of her consent
4 marriage based on the free consent of the bride and bridegroom

In the second or in the third stage, we can observe the development of the dowry We very often find between the second and the third stage the marriage by sham purchase

It must be pointed out that frequently some of the stages are absent, and other stages of the development of the forms of marriage take their place or are added

Lastly we must add that besides the above mentioned development of the forms of marriage there existed another development, namely polygamous marriage among people living at a lower stage of evolution which in course of time lost its characteristics in favour of monogamous marriage At the highest stage of culture only monogamy exists

Westermarck rightly maintains in his "History of Human Marriage" (Vol III p 105) 'No superstitious beliefs keep civilised men apart from their wives during pregnancy and for a long time after childbirth The desire for offspring has become less intense A large family instead of being a help in the struggle for existence is often considered an insufferable burden A man's kinsfolk are no longer his only friends, and his wealth and influence do not depend upon the number of the wives and children A wife ceases to be a mere labourer, and manual labour is to a large extent replaced by work of domestic animals and the use of the implements and machines The sentiment of love has become more refined and, in consequence, more enduring To a cultivated mind youth and beauty are by no means the only attractions of a woman, and besides, civilisation has given female beauty a new lease of life The feelings of the weaker sex are held in higher regard and the causes which may make polygamy desired by women themselves no longer exist Better education bestowed on them, and other factors in modern

civilisation, enable them to live comfortably without the support of a husband" The development of marriage must be traced from polygamy, sometimes polyandry to monogamy

1. Marriage by Capture

66 At the primitive stage of civilisation the family or clan was the sole unit of a social life This family or clan was endogamic The women were at that time the common possession of all the members of the family or clan and no one of these members had the individual and exclusive right over one woman Probably later the right of one individual member of the family or clan over a woman, if she was captured by him from another family, was recognised Recognition of this first right by capture forms the earliest basis of individual marriage

In this way marriage by capture becomes the first form of marriage, that is the first form of individual marriage [1]

In this way, marriage which was formerly endogamic becomes exogamic The wife was no longer taken from the same family or clan but from another Thus can be traced the first development of the institution of marriage

67. What is the definition of marriage by capture?

The taking of a woman by a man by force without her consent and without the consent of her kindred is marriage by capture

The practice of capturing wives prevailed in nearly all parts of the world, and traces of it are met with in the marriage ceremonies of several peoples indicating that it occurred more frequently in past ages In the ancient *civilized world* marriage by capture was prevailing in Greece, Rome, Arabia etc In India it was represented by the Rakṣasa vivaha and Paisaca vivaha.

In Japan marriage by capture is said to have been common in ancient days, but from the time of Taiho ryo (701 1192) this custom was gradually abandoned according to Nakajima ('Marriage' Japanese and Korean in Hastings Encyclopaedia of Religion and Ethics", VIII-460) The capture of women for wives prevailed among the ancient Semites according to Robertson Smith (Kinship

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1 [illegible]

concomitant causes, such as the hostile relations of primitive neighbouring groups resistance from female coyness, and opposition of parents to the taking away of daughters ("Sociology" page 649 6.5)

and Marriage in Early Arabia pp 72 sq) and Wellhausen ' Die Ehe bei den Arabern" in "Nachrichten von der koenigl Gesellschaft der Wissenschaften zu Goettingen" 1893 p 435 In Arabia it was common before Muhammad

Among the Hebrews members of the military class were allowed to marry foreign women taken in war contrary to the law which forbade intermarriage with the Gentiles (Deuteronomy XXI-10) According to Dionysus of Halicarnassus (Antiquitetum Romanorum quae supersunt II 30 5) marriage by capture at one time existed throughout Greece, and according to Sakellarios (Die Sitten und Gebraeuche der Hochzeit bei den Neugriechen p 61) it occurred there occasionally even in quite recent times "Les premiers Romains" says M Ortelan (Histoire de la legislation romaine p 81) "d'apres leurs traditions heroiques, ont eté obliges de recourir a la surprise et a la force pour enlever leurs premieres femmes "

68. The ancient Teutons evidently captured women for wives, according to Dargun (Mutterrecht und Reubehe und ihre Rechte im germanischen Hecht und Leben (p 111) Of the Scandinavians Olaus Magnus says that they were constantly at war with one another "propter raptas virgines aut arripiendas" (Historia de gentibus septemtrionalibus p 328) In the earliest Teutonic laws though marriage by rape is a punishable offence, it is admissible as marriage (Poll and Maitland's History of the English Law before the time of Edward I, II 364) In the Irish Nennius we read of the rape of wives by the Picts from Gael, according to Wood-Martin (Traces of the Elder Faiths of Ireland II, 35, 37) Marriage by capture also occurred among the Slavs in early times, according to Maciejowski s Slavische Rechtsgeschichte (II-189) The Cossacks of Little Russia and the Ukrainians practised it still in the XVII century (Kowalewski Modern Customs and Ancient Laws of Russia p 24) and many Southern Slavs in the beginning of the XIXth or later (Krauss Sitte und Brauch der Suedslaven p 245) In High Albania the forcible capture of a girl occasionally occurs to this day, according to Durham (High Albania and its customs in 1908) The same is the case among the Caucasian mountain tribes who consider that a captured girl becomes the wife of her captor by being deflowered by him, see (Darinsky's Die Familie bei den caukasischen Volkern" der Zeitschrift. f vergl Rechtswiss XIV, 198)

69. Marriage by capture still exists even in Modern times among certain primitive peoples In Tierra del Fuego marriage by capture sometimes occurs both among the Yaghans and the Onas (see Hyades's Ethnographie des Fuegiens in Bull. Soc d'Anthr Paris III Vol XX 334) Of the latter it is said that when they make war on a neighbouring tribe they kill off the men and marry the women, whereas in times of peace, when they take wives from their own

tribes marriages are arranged by peaceful negotiations between the father of the parties (see Gallardo's Tierra del Fuego Los Onas p 214). In many Brazilian tribes, also, women are captured from other tribes and married to the captors (see Martrius's Beitraege zur Ethnographie Amerikas I 107, 372, 620), *among the Karaya wars* seem to have been waged solely for this purpose (see Krause's "In den Wildnissen Brasiliens" p 320), but among the Bororo marriage by capture occurred even *within the tribe (see K von den Steinen-* Unter den Naturvoelkern Zentral Brasiliens, p 500) The same mode of marriage is found among the Indians of Equador

The Macas Indians acquire wives by purchase if the women belong to the same tribe, but otherwise by force (See Buckley, quoted by Lubbock, Note on the Macas Indians, in Jour Anthr Inst iii. 30) The Jibaros frequently make war only in order to procure wives (See Rivert's "Les Indian Jibaros" in l'Anthropologie, VIII 605, 615) The Zaparo Indians in many cases take forcible possession of women, the men running away with their neighbours' wives, and though the women may sometimes object, they make no virtual difficulties, but, apparently, ' rather like being run away with". (See Simson's, "Travels in the Wilds of Ecuador", p 172 sqq The Caribs married female captives of war who pleased them, see de Poincy's, ' Histoire naturelle et morale des Iles Antilles de l'Amerique," p 545 *Among the Comanche marriage by capture occurred now and then,* (See ten Kate s "Reizzn en onder zoekingen in Noord Amerika, p 390) Among the Luiseñou Indians on the coast of California one method *of marriage is said to have* been "for a man and several of his friends to carry off by force the woman he wished marry, even from the house of her parents " (See Sparkman's, ' Culture of the Luiseño Indians in University of California Publications in American Archeology and Ethnology, VIII 214) Among the Aht a man occasionally steals a wife from the *women of his own tribe, (See* Sproat's, ' Scenes and Studies of Savage Life," p 98) On the east coast of Greenland the men not infrequently abducted other men's wives, *sometimes at the request of the woman's own family,* in order that she should be better supported. (See Holm's, Konebaads editionen til Grinlands Ostkyst 1883 85, in *Geografisk tidskrift, VIII* 92) The inhabitants of Unimak invaded the other Aleutian lands chiefly for the purpose of carrying off women, (See Coxe's "Account of the Russian *Discoveries between Asia and America," p 257)*

Among the Chukchee Dr Bogoras was told that in olden times "a company of young men would seize a young girl in the open, bind *her hands and feet, and carry her to the house of one wanted* to have her for a wife Not only the men of other families, but even the relatives and cousins acted so, after having been refused by the girl's father The assault and ravishing however, were not con-

sidered as a reason for implacable hatred and feuds. The parents would come afterwards and ask for ransom, which was paid, not in reindeer, but one woman for another . . . . Even at present a case of ravishment may happen now and then. (See Bogoras's Chukchee p. 590) The great wars of the Gilvak, very often served the object of carrying off women, and even now marriage by capture occurs among them, when a man lacks the means of buying a wife, although such an act is usually followed by blood revenge (See Sternberg, reviewed in L'Antopologie v 343 Schrenk, quoted by Miss Czaplicka's Aboriginal Siberia, p 101)

In New Caledonia '*les enlèvements de femmes mariées ne sont . . . pas rares, et souvent ils attirent des guerres entre les tribus ou les familles, à moins que celui qui a fait le rapt ne soit un chef ou relativement un grand personage*" (See Brainnes's, "La Nouvelle-Calédonie, p 251 sq) On the larger islands of the Fiji Group the custom of seizing upon a woman by apparent or actual force in order to make her a wife was often found (See William's and Calvert's, Fiji and Fijians, p 149) Among the Maori female prisoners of war were generally appropriated by members of the victorious party and taken as inferior or slave wives (See Best's, "Maori Marriage Customs" in Trans and Proceed New Zealand Institute, XXXVI, 63) Of the same people we are told that "an ancient and favourite way of marriage was to get up a war-party (or mimic war-party) and carry off the bride by force There were so many relatives to be consulted, some of whom would be sure to feel aggrieved if their consent was not obtained, that abduction was easiest There was often feigned abduction and feigned defence, but it was at times very hard on the girl (See Tregear's, "The Maori Race", p 293 See also Taylor's "Te Ika a Maui", p 336)

The Tasmanians captured women for wives from alien and hostile tribes (See Milligan, quoted by Nixon in "Cruise of the Beacon", p 29) In Australia marriage by capture has been found in all parts of the continent (See Hodgson's, "Reminiscences of Australia," p 243) Mr Mathew says that "marriage by capture takes place between members of hostile communities Sometimes a surprise party will be organised to attack a camp, slaughter the males and abduct and appropriate the females The wholesale abduction is paralleled by individual cases of forcible abduction, on which occasion the woman, if resisting, will be cruelly beaten" (See Mathew's, "Eaglehawk and Crow," p 113 sqq) Speaking of some Central Australian natives Willshire observes that if a man does not succeed in securing a wife in the formal and regular fashion, he is driven to the hazardous course of stealing one (See Willshire's, "Aborigines of Central Australia," p 13) Spencer and Gillen, however, say that capture is the "very rarest way in which a Central

Australian secures a wife (See Spencer's and Gillen's, "Native Tribes of Central Australia," p 104, 554 sqq) Contrary to some statements made by early observers in New South Wales, it is usually reported to be merely an exceptional or occasional mode of contracting marriage in Australia (See Malinowski's, "The family among the Australian Aborigines", p 53sqq)

Of the Sakalava in Madagascar we are told that every year they steal many women of other tribes, and that some of their wives Hova and Babsileo women from the interior are eagerly sought after by the cattle lifters (See McMahon's, 'Sakalava and their Customs' in Antananarivo Annual and Madagascar Magazine, IV 391 sqq) Anderson states that among the Bushmen women is only too often *"belli teterrima causa"* (See Anderson's, 'Okavango River" p 143) Among the Auin who belong to the Kalahari Bushmen, women and girls who are captured in war are adopted and married into the tribes of the captors (See Kaufman's, "Die Auin" in Mittheil d Deutsch Schutzgeb XXIII 154) Concerning the Hottentots—whose marriage customs generally required that cattle should be given by the bridegroom to the nearest relatives of the bride we read that "one of the principal objects in their wars with each other was to take females as prisoners who were generally regarded as mere concubines, but were sometimes, raised to the dignity of wives The difference involved a right over the distribution of the milk, and upon it depended the inheritance of the children" (See Theal s, "Yellow and Dark-skinned People of Afrika south of the Zambesi' p 85) So also it is the custom among the Fingu a kafir tribe, that a girl who has been captured in war can be legally married to the captor, if only he publicly declares that she is his wife, although otherwise a woman whom a man takes to his hut without paying anything for her is regarded as a concubine or as a prostitute (See Kropf's, 'Das Volk der Xosa-Kaffern im ostlichen Sudafrika" p 138sqq) In the different groups of the Ababua, Babati and Baieu (Bantu speaking) tribes along the Upper Wele Bokandi and Upper Rubi rivers, according to Grenfell, "marriage by capture is of common occurrence, but frequently results in war between the two villages, properly the husband ought to buy his wife, her consent not being absolutely necessary "So also marriage by capture is said by the same writer to exist among the forest tribes in the north-eastern part of the Mongala basin "A man carries off a wife by force, betakes himself with her to the forest, lives there by hunting, and only returns to the village when the wife has a child and it is weaned. Returned home, he quits his temporary wife, and gives her half the proceeds of their hunting

in exchange for the child. (See Johnston's George Grenfell and the Congo II, pp 676, 674) Many other examples could be quoted *

70. There are *many kinds of marriage by capture* and various kinds of marriage co-exist sometimes in one nation We find it not only in India (Rakṣasa-vivaha, Paiśāca-vivāha and Gāndharva-vivāha combined with the Rākṣasa-vivaha) but also with other nations And so with Galela and Tobelorese we distinguish a marriage by capture (like the Rākṣasa-vivaha), a marriage by secretly creeping into the house of a woman (like the Paiśca-vivaha) and a marriage by abduction (like the Gāndharva-vivaha combined with the Rākṣasa-vivaha) The Slavs of the South distinguish between a girl captured against her will (otkradnota, moma kradena, or ugrabljena, oteta djevoyka) (like the Rākṣasa-vivaha), a girl captured against the will of her parents but with her connivance (*prestanka, moma priestanola*) (like the Gāndharva-vivāha combined with the Rakṣasa-vivaha (and a girl who ran away of her own will from her father's house to that of her lover (*bjegunica, ubjeglica, podjegnola moma*) combined with the Rakṣasa-vivaha) (See Kraus's "Sitte und Brauch bei den Suedslaven p 245) Among the Galla there exists a symbolical marriage by capture, and a marriage constituted by a girl's flight or elopment in agreement with her lover, without her father's permission from his house to that of her lover (like the Gāndharva-vivaha)

The marriage by capture may be a real capture or a symbolical act Real capture would consist of the capture of a woman during war or her capture by a wooer or his relations The symbolical act of capture is to be found with many variants Among the Gallas there exist two kinds of marriage by capture One named "ananota" and the other "buta" The first is real capture, the second symbolical capture, by this last "capture" the wooer captures the girl with the consent of her parents, after this capture he receives from his father-in-law oxes and cows There is no doubt that the capture of a woman became with the development of human civilization the regular form of marriage Marriage by capture was based upon the violation of the existing (international) law because it was based upon robbery This violation of existing (international) law often caused a war between one family or clan and the other The families or clans would, however, often not go to war It could be avoided by an agreement between the two families or clans when it was stipulated that instead of war the wooer paid the penalty

* Among the Samoyeds Votyaks, Ostyaks Voguls Cheremisses Mordvins Tatars of Crimea, Yakuts Kalmuks Esthonians in Purang among the Bhotias among many tribes in India (Sikhs Malayalis etc.) in Malai Archipelago in Philippines in British New Guinea, among the Aruntas in British Central Africa, among the Berbers of Morocco and many others See Westermarck II ch XXI

In this way, probably, arose first as an alternative and afterwards in place of the marriage by capture a new form of marriage, marriage by purchase

71. According to Westermarck marriage by purchase grew out of marriage by capture We read " It has been suggested that the transition from mariage by capture to marriage by purchase was brought about in the following way abduction, in spite of parents, was the primary form, then there came the offering of compensation to escape vengeance, and this grew eventually into the making of presents or paying a sum beforehand" (See Koenigswarter's, 'Études historiques sur le development de la societe humaine," p 53, Spencer's "Principles of Sociology" I p 625 and others)

The same can be observed in *Ancient India* Marriage by capture, irrespective of the manner, either capture by force (Rakṣasa-vivaha) or by cunning (Paisaca) is a marriage prohibited by law, for capture was considered as a crime (Mn VIII-323, Y II 282, Brh XXII-18, K. IV-12, Vyâsa-Vivad 318, and others), and a crime of such a degree as to be threatened with capital punishment Therefore it is difficult to believe that as these marriages were described in the Smṛtis as avoidable they could exist as legal marriages at the time of the validity of the Smṛtis although they are mentioned therein It is a typical example of an act non existent in practice and in course of time prohibited remaining as an out of date and archaic law Although there is no actual proof of this it is probable that marriage by capture was the most primitive form of marriage in Ancient India Comparison with general sociological literature points to this form of marriage, especially explained in MBh (Arjuna, Bhiṣma, Duryodhana) as being the proper form for the Kṣatriyas When the so-called Aryas came to India from the North, they were likely to capture women of the country, which would bring about marriage by capture These so-called Aryas were warriors and the prototypes of the Kṣatriya caste That this form of marriage had already lost importance at the time of the validity of the Smṛtis may be concluded from the fact that Ap and Vâs., do not mention the Paiśâca vivaha.

Probably this primitive form of marriage disappeared in India and marriage by purchase came into being along side or in its place.

2. Marriage by Purchase

72. We may accept that the purchase was an *agreement between two families or two tribes* That would appear to be so from the fact that with some nations the blood friends of the bridegroom were obliged to share in paying the price for the girl and that on the other hand the blood friends received part of the purchase-money Probably the purchase of the woman was an intertribal

agreement Later the rights and the duties of the members of the tribe were eliminated and one person undertook the duties and also obtained the rights formerly pertaining to the copartners, that existed in patriarchal times

73. The foundation of the marriage by purchase is a family with a definite head This head must have the right over other members (copartners) of the family, especially over the women, of an owner over possessions, which can be purchased by him Having acquired the right of purchase and of disposal of an object, that object can be handed on to another at the price determined by the owner

In practice the head will be the *pater familias*, the father, and the object which can be sold by him will be his daughter who will be considered by him as a piece of merchandise He who bought this object from the owner became its sole owner and had the same right over it as his property as had the previous owner In other words the girl became the property of her future husband instead of that of the previous owner, her father The husband would exercise the same right as was hitherto exercised by her father.

This was apparent in Ancient India It is well known that in Ancient India at the head of the family stood a principal—*pater familias*—who had extensive rights over the whole family and a girl *sub patria potestate* came *sub manu mariti* (Mn IX-3, V-148, MBh XIII-46, 14, Y I-85, 86, Vās V-2, Vi XXV-13, B II-2, 3, 45, Nar in Vivad 410, 411, Smrtyantara Aparârka p 109) The father had the right to sell his daughter Thus this marriage in Ancient India was represented typically by the Ârsa vivâha

74. What is the *definition* of the marriage by purchase?

The purchase of a girl from her family for an fixed price, that is the marriage by purchase

That is the rule, but it must be added that by paying the purchase price the bridegroom receives in some nations extensive rights and in others his rights are curtailed These rights depend on the degree of independence the woman obtains from her former family When she becomes quite independent she will—as a rule—be the property of her husband If she is not quite independent of her former family her husband will as a rule—have only limited rights over her and her former family will also have the right and the duty to protect her

75 Marriage by purchase is known more or less to all nations of the *ancient world* and to races at a primitive stage of developments, sometimes also a higher stage of civilization, living in the new world

In Japan marriage by sale is said to have been common in ancient days, but from the time of the Taiho ryo (701-1192) this custom was gradually discarded, according to Nakaji's 'Marriage" (Japanese and Korean in Hastings's, "Encyclopoedia of Religion and Ethics, VIII-460)

Marriage by purchase was the first form known to the Semitic races

In Babylonia a suitor had to give to the father of the intended wife a bridal price or present (tirhätum or terhatu), the amount of which varied, according to the rank of the parties, and if the young man did not himself posses the sum which was required, his parents were expected to provide him with it (See Koschaker's, "Rechtsovergleichende Studien zur Geetszgebung Hammurapis' p 130 sqq, Meissner's "Beitraege zum altbabilonischen Privatrecht" p 13 sqq). But from the Laws of Hammurapi we learn that although it was the general custom for a man to pay a bridal price to his father-in law, this payment was not universal (see "Laws of Hammurai', § 138 sqq, John's translation, p 27) Koschaker (in Rechtsvergleichende Studien zur Gesetzgebung Hammurapis p 153 sqq) explains this by suggesting that marriage by purchase had ceased to exist according to Sumerian law, whereas it was retained in Babylonian law The bridal price was also reverted to the husband if the wife died without having given him children (See "Laws of Hammurapi, §163 sqq—Johns's translation p 32 sqq) In Genesis we read that Jacob served Laban, his mother's brother, for seven years for each of his cousins Leah and Rachel (Genesis, XXIX-20 sqq), but the usual method of obtaining a wife in ancient Israel was by paying a bride price, called *mohar* or *mahr*, (See Ewald s "Antiquities of Israel" p 200, Gans's "Das Erbrecht in weltgeschichtlicher Entwicklung" I 128 Robertson Smith's, "Kinship and Marriage in early Arabia" p 70 Wellhausen's, Die Ehe bei den Arabern' in Nachrichten der Konigl Gesellschaft der Wissenschaften zu Gottingen, 1893, p 433 Benzinger's, "Hebraische Archaologie" p 106 Nowak's, "Lehrbuch der hebraischen Archaologie" I 155) According to Talmudic Law the mutual consent of the parties to marry each other has to be legally manifested with a special formality, which gives validity to the marriage contract The usual formality is that called *kaseph*, or "money" In the presence of two witnesses the man gave to his chosen bride a piece of money—even a *perutta*, the smallest copper coin used in Palestine was sufficient for the purpose—or object of equal value with the words 'be thou concecrated to me", but during the Middle Ages it became customory for the act of betrothal by *Kaseph* to be performed by means of a plain ring, instead of a piece of money, and this custom has ever since pre-

vailed up to our time (See Mielziner in Jewish Law of Marriage and Divorce in Ancient and Modern Times (p 77 sqq) The betrothal by *kaseph* may be a survival of the old marriage by purchase, but it has also been supposed to be an imitation of the roman *coemtio*

Among the ancient Arabs a bridal price, *mahr*, was given by the bridegroom to the father or guardian of the bride, and this bridal price has survived in Muhammadan law, where it has been confounded with the *ṣadâq*, which was a gift offered to the bride by the bridegroom (See Robert Smith's Kinship and Marriage (p 76-78, 91) in Early Arabia Although the Koranic law presumes that the *mahr*, or *ṣadâq*, shall be the property of the bride, this rule is not always followed in practice

Aristotle tells us that in Grecian primitive times men bought their wives (Politica II-8) In heroic times a suitor gave *hedna* consisting of cattle, to the father of the bride elect, and a maiden was called *alfesiboia*, that is, one who brings her parents many oxen as presents from her suitor according to Ilias (XVIII-593), or by some other name compounded from the Greek word for an ox, the gold currency of the time (See Murray's "Rise of the Greek Epic", p 86) Contrary to other writers, Hruza maintains that the *hedna* was not the price of a bride, but merely a *douceur* intend-ed to prevail upon the father, but he admits that in a yet earlier age marriage by purchase existed in Greece, although, as he rightly points out, the transaction could not have been the purchase of a chattel but only of the rights of a husband (See Hruza's Beitraege fuer Geschichte des griechischen und romischen Familienrechtes, I-8 sqq)

Marriage by purchase cannot with equal certainty be establish-ed as a form of marriage on Roman soil, but a reminiscence of it is supposed to have been preserved in the symbolical process of *coemtio*, which was the ordinary form in which any Roman citizen whether patrician or plebeian, might contract a marriage It was a traditional ceremony representing the purchase of a bride, the intending husband "purchasing" the bride from the person under whose authority she was, with a view to thereby acquiring that marital power without which marriage as a legal relationship was considered impossible (See Rossbach's "Untersuchungen ueber die roemische Ehe," pp 80, 87 sqq , Sohm's "Institutes" p 452 sqq and others) On the other hand there are also writers who deny that *coemtio* can be regarded as a survival of ancient bride purchase Marquardt maintains that it was an artificial and comparatively late form of marriage, whilst *confarreatio*, the specifically patrician kind of marriage which suggested no idea of purchase, was the oldest

form of marriage in Rome (See Marquardt's "Das Privatleben der Roemer" p 38) Karlowa thinks that if marriage by purchase prevailed in ancient Rome or among the ancestors of the Romans, a survival of it remained *not in the coemtio but in the arrha sponsalitia*, which in historical times was given to the bride (See Karlowa's "Roemische Rechtsgeschichte", II-166)

Marriage by purchase was a custom of all Teutonic peoples

There is a kind of *marriage by service in the* "Eyrbyggja Saga". Vigstyr says to the berserk Halli, who asked for the hand of his daughter Asdi "As you are a poor man, I shall do as the ancients did and let you earn your wife by hard work" (See Weinhold's "Altnordisches Leben," p 242) *But the general consideration given* for a bride was money paid down by the bridegroom Originally, we may presume, that the amount of it depended on agreement, but during the period of the law-books, both in England, and on the Continent, it *was generally fixed by custom or by statute* (See Sohm's "Das Recht der Eheschliessung", p 23 sqq) The bridal price was called *wittum* or *widem*, the Anglo Saxons called it *weo tuma*, the Longobardians *meta* or *mundium* the Frisians *mundsket*, the Scandinavians—*mundr*, and in Latin it was termed *pretium nuptiale* or *pretium emtionis* (See Schroeder's "Lehrbuch der deutschen Rechtsgeschichte' pp 70, 299, V Amira s 'Recht' in Paul's *Grundriss der germanischen Philologie III-161*) *Betrothal was mercatio*, and to marry was *uxorem emere* or *feminam vendere*. (See Brunner's 'Deutsche Rechtsgeschichte", I-14, Schroeder's "Lehrbuch der deutschen Rechtsgeschichte' p 299) The Kentish law of King Aethelbirht speaks of a man buying a maiden with cattle, and the transaction is called a "bargain", (See Laws of King Aethelbirht, ch 77) In Germany the expression "to purchase a wife' was in use *till the end of the Middle Ages* (See Laband s "Die rechtliche Stellung der Frauen im altroemischen und germanischen Recht', in Zeitschrift fuer Voelkerpsychologie und Sprachwissenschaft, III 154) and we *find the same term in Christian* IV's *Norwegian* Law of 1604 (See Olivecrona's 'Om makars giftoraett i bo", p 150) In Holland the bride is still, in the language of the common people represented as *verkocht*, that is "sold' (See *Brunner s Deutsche* Rechtsgeschichte p 74) But here again we should notice that marriage by purchase did not imply the purchase of a piece of property, the ancient Teutons bought the *mund* or protectorship *over the woman* (See Friedberg s "Das Recht der Ehe-schliessung in seiner geschichtlichen Entwicklung, p 18) and other rights which marriage conferred on the husband

Marriage by purchase prevailed among the early Slavs (See Ewers's '*Das alteste Recht der Russen*" p 226 *Maciejowski's Slavi-*

sche Rechtsgeschichte II 195). The bride price was called* *veno*, in Polish *wiano* (See Piprek's Slavische Brautwerbungs-u Hochfeitsgebräuche p 151) and in old Russian a marriageable girl was called a *kunka*, from *kuna* "marten" because her parents might exchange her for marten skins, the usual medium of payment in Ancient Russia (See Schrader's Family Teutonic und Balto-Slavic Encylopoedia of Religion and Ethics V-750) To this day among the Russian peasantry" says Schrader, "the first act of the nuptials is the suit or proposal *svátanie*, which is a purely commercial transaction. The father of the suitor usually accompanied by a relative visits the girl's parents and says, 'We have a purchaser, you a commodity will you sell your ware?' Then follows the bargaining, which differs in no respect from a negotiation about the sale of a cow" In Serbia at the beginning of the XIX century the price of girls reached such a height that Black George limited it to one ducat (See Kraus's Sitte und Brauch der Südslaven p 275). In High Albania "marriage is entirely by purchase, except for the occasional forcible capture of a girl" (See Miss Durhan's, High Albania and its Customs in 1908, in Jour Roy Anthr Instit XL 59).

The Ancient Celts paid a price for their brides In Ireland it consisted of various objects, such as articles of gold, silver or bronze clothes or horse-bridles, cattle or swine, land or houses (See Sullivan's Introduction in O Curry's, Manners and Customs of the Ancient Irish Vol I p CLXXIV sqq) It often had the form of a yearly payment from the husband after marriage, and we find it laid down in the Brehon Law that the woman's father was entitled to the whole of the first year's bridal price See Ancient Laws and Institutes of Ireland II-347, III-315 In Ireland it was called *coibche*, though there were also other names for it (See Joyce's, Social History of Ancient Ireland II-4) and in Wales *gober (gobyr)* or *amober (amobor, amobyr)* (See d'Arbois de Jubainville's Cours de la literature celtique VII-234, Venedotian Code II-19, 1 and others) †

Marriage by purchase exists also recently among peoples at the so-called primitive stage of civilization Many examples could be quoted

76. Marriage by purchase was also known in Ancient India and is represented by the Asura-vivāha It is similar to the marriage by purchase of the Batans, among the people of the island of Nias etc , where a actual contract of purchase took place In this agreement the girl was considered solely as a merchandise and the price given for her depended on the circumstances of the parties

* Quoted from Westermarck II p 413
† Quoted from Westermarck II pp 407 sqq

3. Marriage by Sham-Purchase

77. The amount given for a wife varies greatly among different peoples In the lowest tribes it is very little Among the Veddas of Ceylon some food is presented to the parents of the girl, (see Hartshorne's "Weddas", in Indian Antiquary, VIII 320) or nothing at all, apparently, may be given for her (See Le Mesurier's "Veddas of Ceylon", in Jour Roy Asiatic Soc Ceylon Branch, IX 340) Among the Sakai of Perak the bridegroom makes a present to his prospective father in-law of certain specified articles, for example, knife, or hatchet, or yams, "according to his means" (See de Morgan's "Moeurs, coutumes et langages des Negritos de l' interieur de la presquile Malaise", in Bull Soc normande de Geographie, VII 421), whilst among the Orang Sletar of the Orang Laut a mouthful of tobacco and one *chupah* of rice handed to the mother of the bride confirms the hymenal tie (See Thomson's "Remarks of the Sletar and Sabimba Tribes," in "Jour Indian Archipelago", I 341) In some Australian tribes, where the exchange of females is the custom the bridegroom supplies his father or parents-in-law with game, or in addition presents the former with boomerangs and other weapons (See Howitt's "Native Tribes of South East Australia", p 220) Concerning the Central African Pygmies, Grenfell says that marriage among them ' is little else than the tendering of a gift of arrow heads or knives or other objects of local value to the father of the girl, who is thereby acquired by the purchaser, though no doubt inclination counts for much in the bargain " (See Johnston's "Geogre Grenfell and the Congo", II, 674 See also Casati's "Ten Years in Equatoria," I 157) According to Hutereau, again, a man acquires a girl for wife by offering to her father two animals killed in the chase and to her mother a dog (See Hitereau's ' Notes sur la vie familiale et juridique de quelques populations du Congo Belge", p 4) Among the Namib Bushmen some food, blankets, and furs are given to the prospective parents in-law (See Trenk's "Die Buschleute der Namib in Mittheil Deutschen Schutzgeb XXIII-168)

With the development of civilization the girl, probably, ceased to be an object of merchandise

With progressing civilization, the practice of purchasing wives was *gradually abandoned*, and came to be looked upon as infamous The wealthier classes took the first step and poorer and humbler persons subsequently followed their example

This above mentioned condition existed at the time when the patriarchal organisation disappeared and was replaced by the system of State

We meet with the same evolution in India. There too the purchase of a girl became an infamous act (Mn IX-100, IX-98, III-51), a sin (Mn. III-52) and even according to some sources a prohibited act (Ap II-6, 13, 11) or a great crime (B I-11, 21, 3) and a woman married according to this form of marriage was not considered as a wife (B I-11, 21, 2)

It may be deduced from the rules contained in the sources that this form of marriage was out of date in the Smrtis, and though it cannot be maintained that it was absolutely archaic it must be considered as slowly disappearing

78 We may discern too different *ways in* which this gradual *disappearance of marriage by purchase* has in general, taken place On the one hand, the purchase became a symbol and appeared as a sham purchase in the marriage ceremonies or as an exchange of presents, on the other hand, probably in the second stage of the development of marriage by sham-purchase the purchase-sum was transformed into the morning gift and the marriage portion, a part —afterwards the whole—was given to the bride either directly by the bridegroom or by her father These changes in marriage by purchase have taken place not only in the history of the civilised nations but also among several peoples who are still in a savage or semi-civilised state, and in few instances it is expressly stated that they consider marriage by purchase a disgraceful practice

79. We see the same development of symbolical purchase in many nations And so in the *Ancient World* with the Roman *coemtio* (a kind of a marriage with *manus*), the form shows that the marriage according to the Roman Law was a real purchase The woman there declared she would be sold in order to become a *mater familias* in return for which the husband took her hand and said *"ego ex iure Quiritum matem familias meam esse ajo"* The piece of ore reputed to be the purchase price was then weighed out In pre-historic times the purchase was probably accomplished on the principle of the "gens" Regardless of the real value of the merchandise i e, the girl the price was a piece of ore According to Salic law the guardian of the girl received an *"arra"*, a *"solidus"* and a *"denar"* for his consent to the marriage, a symbolical price as compared with the former real price of purchase

80. Among many *tribes at a lower stage of civilisation* the price paid for the girl is only symbolical

Among the Angmagsaliks on the east coast of Greenland, according to Holm, ("Ethnologisk Skizze af Angmaksalikerne in Meddelelser om Groenland" X-96) the young man may have to give to the father a harpoon or some similar article to get his daughter in marriage, but it also happens that good hunters are paid by fathers to marry

their daughters Among the Eskimo of the Ungava district, Hudson's Bay Territory, "the sanction of the parents is sometimes obtained by favour or else bought by making certain presents of skins, furs, and other valuable to the father and mother" (See Turner's "Ethnology of the Ungava District, Hudson Bay Territory" in Ann Rep Bur Ethn" XI-188) Among the Eskimo round Repulse Bay the father who selects a little girl for his young boy to be his daughter-in-law pays her father something—perhaps a snow-knife or a sled or a dog or, nowadays, a handful of powder and a dozen percussion caps (See Gilder's "Schwatka's Search' p 249 sqq) Of the Central Eskimo Dr Boas simply says that the bride must be bought from the parents with some presents (See "Boas's Central Eskimo" in Ann Rep Bur Ethn VI 579)

Among the South American Indians the consideration, if any, given for a wife likewise varies greatly in different tribes A Huitoto bridegroom gives a small quantity of cocoa or tobacco to the *capitan*, or chief of the subtribe, to obtain his approval, and cuts a supply of firewood for his future mother-in-law, and shortly afterwards the girl is given to him (See Hardenberg's "Putumayo" p 154) Among the Puris, Coroados, and Covoapôs some game and fruit only are given by the bridegroom for his bride immediately before marriage, whereas the more civilized tribes of the Brazilian aborigines carry on an actual trade in women (See v Martius's "Beitraege zur Ethnographie und Sprachenkunde Amerikas zumal Basiliens" I-109 sqq) The price paid for a Goajiro girl chiefly consists of cattle (See Simon's "Exploration of the Goajiro, Peninsula, U S of Colombia" in Preceed Roy Geograph Soc N S VII-792) Among the Mocobis in the southern part of the Gran Chaco a girl was given in marriage either for some tiger-skins or for one or two horses, a cow, and a few ornaments (See Kohler's "Pater Florian Baucke" p 315) The Patagonians give mares, horses, silver ornaments for their bridges, even a hundred mares have been paid for an heiress who has animals of her own (See Muster's 'On the Races of Patagonia" in Jour Anthr Inst 1 201) † Many other similar examples could be given

81 The same also appears in Ancient India with the Arṣavivâha, where the price did not correspond to the real value of the purchased "Merchandise" The price paid for the girl consisted of a cow and a bull and a dress (N XXI-41) or of suit of clothes (Śaṅkh. Likh Vir Sam 851) and afterwards permanently of a cow and a bull (Mn III-29, Ap II-5, 11 18, G IV-8, Vas II 32, B I-11, 20, 4, Śaṅkh XX-4, Aśv Gṛh I-6 4 and other) The price was paid probably in the first stage of the development of this form of marriage

† Quoted from Westermarck II p 375 sqq

to the father (Ap II-5, 11, 18 K III-2) or to him who had authority over the girl (G III-8, B I-11, 20, etc)

4. Dowry

82 It seems that the development of marriage by sham-purchase has not come to an end but the purchase price has been transformed into the morning gift or a marriage portion

And so from marriage by purchase or a symbolic marriage by purchase in which the price paid for the girl did not correspond to the real value of the girl *we come to the practice of dowry*, which is apparently the very reverse of marriage by purchase But whilst the marriage portion partly derives its origin from the purchase of wives, it does not do so in every case It serves different ends, often indissolubly intermingled It may have the meaning of a return gift It may imply that the wife as well as the husband is expected to contribute to the expences of the joint household It is also very often intended to be a settlement for the wife in case the marriage be dissolved through the husband's death or otherwise In the social history of the civilised races the marriage portion had played so prominent a part, that, as we have spoken of the state of marriage by purchase, we may speak of another and later stage where fathers are bound by custom or law to portion their daughters

We see the limitation of the form of marriage by purchase by the fact that the parents of the woman more or less lose the economic advantages they derived from her marriage, and that greater regard is paid to the interests of the contracting parties We meet here with the practice of offering a return gift

83 We can find many examples *in the Ancient World*. In China the parents of the bride, or her guardian, accept only a part of the proffered presents, returning the balance, to which they add some articles for the parents of the bridegroom but they accept all the money, and all the silks and satins designed for the use of the girl (See Doolittle's Social Life of the Chinese II-71) The exchange of presents forms in fact, the subject of a long section in the old penal code, for "the marriage articles and betrothal presents once exchanged, the parties are considered irrevocably engaged" (See Medhurst's ("Marriage, Affinity and Inheritance in China' in Trans Roy Asiatic Soc China Branch, IV-11) As to the presents exchanged at the time of sending the engagement cards without which no betrothal is regarded as binding it is said that in the Chinese view they are "omens of good to the parties most intimately concerned" (See Doolittle's Social Life of the Chinese II-66 sqq)

In ancient Greece there were at the conclusion of a marriage not only the *hédna* given for the bride but also the *meilia* or presents given by her father to the bridegroom (see Hruza's ("Beitraege zur Geschichte des Griechischen und Roemischen Familienrechtes" I-11) Tacitus, after speaking of the gifts by which a German obtains his wife, says in his "Germania" (Ch 18) that the wife "in her turn brings her husband some gift of arms This", he adds, "represents to them our marriage bond, the mystic celebrations, and all the gods of matrimony" The Welsh *"agweddi"* was, strictly speaking, a payment made by the kindred or parents of the bride to the bridegroom, although the word sometimes seems to have been used to include the marriage portion of the bride as well (See Rhys's and Brynmor-Jones's "The Welsh People" p 211) The dowry which the bride brought with her may also be partly regarded as a return gift to the husband (See Meissner's "Beitraege zum altbabylonishen Privatrecht" p 14)

Among the Teutonic peoples a similar process of development took place At the time of the folk-laws, from the sixth to the ninth century, the bridal price is no longer paid to the father or guardian of the bride, but to the bride herself (See Grimm's "Deutsche Rechtsaltertuemer", p 423), the right of the guardian being practically limited to the receipt of the *handgeld*, that is, to a merely formal gift, (see Sohm's "Das Recht der Eheschliessung" p 33) *a solidus* and a *denarius* according to Salic Law (See Grim's Deutsche Rechtsaltertuemer p 427) †

84. With peoples *at a lower stage of civilisation* the same takes place For instance with Bugines and Makassars the bridal price is balanced by return presents and the bride does not leave her family, according to Wilken, ('Over de Verwand" p 72) With the Mongols the bridegroom buys his bride but his father is obliged to replace the value of his daughter in the dowry, according to Klemm (Kulturgeschichte III-165) Just so with the Tehuenchens the bridegroom gives mares or silver ornaments but he receives back gifts of the same value, according to Kohler Z f v R V-353)

Sometimes a part of the bridal price or even the total sum is employed for the dowry, which is given either to the bride or to the bridegroom In this manner separate property belonging to the wife or a common matrimonial fortune results This group of customs always appears at the time when the institution of purchase of the maiden is dying

Sometimes the father in law returns a part of the bridal price paid by the bridegroom for example recently with the Afghans With the Makassars and Bugines a part of the bridal sum is return-

† Quoted from Westermarck II p 414 sqq

ed to the bridegroom, for example, 4 Reals from the bridal price of 12 Reals, from the bridal price of 20 Reals—5 Reals and so on (see Wilken's "Over de verwand p 72)

With the Bagobos of South-Mindanao the father of the bride returns to the husband half of the bridal price paid when the married couple are satisfied (see Schadenberg's "Die Bevoluner Van Said-Mindauso)" With the Agahrs (Dinka) the father of the bride usually returns ten of the horned cattle paid for the bride as an act of generosity and as a contribution to the new household (see Schweinfurth-Ratzel p 336) It may also happen that the bride sum belongs in part to the family of the bride and in part to the bride herself With the Makassars and Bugines a Real as a part of the bridal sum is retined in favour of the bride and the remainder is distributed among her blood relations (see Wilken's "Over de verwand" p 72)

In many places in Ancient Serbia (now Yugoslavia) they pay one to ten ducats to the father of the bride at home *(u kucu)* or on the table (na siniju) sometimes more whereas the girl agrees with the "apple" *(jabuku)* or the change *(pare)* This earnest money is given to the girl either in cash or single pieces are put in an apple (see Kraus's 'Sitte and Brauch bei den Suedslaven" p 275, 276)

Sometimes the total bridal price belongs to the bride, for example recently with the Dajaks, the Arabs of Ahl el Shemal (see Wilken's "Over de verwan" p 87 and Burckhardt Bemerk Uber die Beduinen p 88)

The same is to be found in *Ancient India* There the price (which, as a matter of fact, was a symbolical one) was paid—it is true—to the father but it was only a return gift because the father had lost the right of retaining the "price" (Mn III-43, MBh Anusa 81, 1-2, XIII-46, 1-2, Gov ad B II-11, 20, 4)

85 With this form of marriage begins the duty on the part of the father of giving a dowry to the girl (MBh XIII-45-2)

In this way we are likely to meet in Ancient India with the second phase of the development of marriage by sham purchase when the symbolical price paid to the father fell as a return gift to the girl's or her future husband's share In this way arises the duty of giving a dowry to the girl This duty of giving a dowry to the girl became afterwards the *"essential negotii"* of the orthodox forms of marriage The fact alone that the "price" returns to the giver, buyer i e to the intended husband points to the origin of the dowry This form of marriage is however, not likely to disappear in the development of the forms of marriage in Ancient India as it too belongs to the orthodox forms of marriage and it is not mentioned whether this form is commendable, or not. Besides this form a

new form arises that is based on the choice of a suitable husband by the father of the girl indepently of her consent.

5 Marriage based *on the Choice of a Husband by the Father of the Girl Independently of Her Consent*

86. We must note that the duty of the father to give a dowry is not the only *essentiale negotii* of the newly formed form of marriage The second *essentiale negotii* of this form of marriage lies in the consent of the principal *of the family, that is, as a rule, of the* father.

This *essentiale negotii*, the consent of the principal of the family, was also known in the forms of marriage by purchase *It was, however*, a *condition sine qua non*, as the seller was the father, and not a *essentiale negotii*

We may observe that by introducing the marriage by purchase there *arose a marriage based on the choice of a suitable husband by* the father of the girl independently of her consent

What is the *raison d'etre* of that kind of marriage We find the answer in the "History of Human Marriage" by Westermarck (II p 283) "*Marriage brings together strange families or* large groups of kindred, or constitutes a new tie between friendly ones It is therefore not surprising that the fathers or parents or other relatives of the parties want to have a voice in the matter Speaking of the careful supervision of marriages among the Maori, Mr Best observes, as Westermarck further states, 'To a great extent it was caused by tribal anxiety to avoid a *mesalliance*, to prevent a person of—good birth from marrying into a family of *ware*, or low born people, to keep unmixed the blood of the *rangatira* class, to uphold the rank, fame, and dignity of first-born lines of descent and hence to prevent all *tipuheke*, or degeneration, of blue-blooded lines" (See Best's Madri *Marriage Customs in Trans and Proceed New Zealand* Institute, XXXVI 50) The power of interference depends, of course, upon the authority which the families or their heads possess *over the individual members of the family* Among the Xosa Kafirs, for example, the father ruled as long as he lives over the whole of his family, including the married sons (See Kopf's p *134 Das Volk der Xosa Kaffern im Östl -Sud-Africa*) Among the Kandhs. in each family absolute authority rests with the house-father the sons have no property *during his lifetime, and all the male children*, with their wives and descendants, continue to share the father's meal, prepared by the common mother (See Hunter's "Rural Bengal", *III 72*) *The father chooses a full-grown woman as wife for his* young son 'In the superior age of the bride' says Colonel Macpherson, in the Memorials of Service in India p 70 sqq is seen but a proof

of the supremacy of the paternal authority amongst this singular people The parents obtain in the wives of their sons during the years of their boyhood very valuable domestic servants, and their selection are avowedly made with a view to utility in this character' (See Macpherson's Memorials of Service in India, p 70 sq)" Much more frequently than the young man, the young girl is dependent upon somebody else's will in the choice of a partner", according to Westermarck Although the subject of family authority among the lower races requires much further investigation, we may safely say that among most of them a girl is in her father's power till she marries, whilst in some instances his authority over her continues after her marriage (See Westermarck's "Origin and Development of the Moral Ideas" 1 601* Yet among various peoples the consent of a mother, brother or maternal uncle is regarded as particularly essential to a girl's marriage, and in such cases the father may even have little or nothing to say in this matter But according to Westermark II 284, the necessity of the father's or somebody else's consent, however, by no means implies that the girl is, or can be, given in marriage against her own will And even where her wishes are not consulted she may know how to make her influence felt He further says that it is a mistake to suppose that among the lower races women are as a rule, married without having any voice of their own in the matter In many cases, their liberty of selection is, on the contrary, very considerable, apart from those already noticed in which they are actually the courters

87 Sociology however gives us innumberable examples of the *absolute power of the father upon his children*

And so in Ancient Chaldea the father as in China and Japan, had great power over his children According to Meissner (Beitraege zum altbablylonischen Privatrecht p 14)† a daughter was given away in marriage by her father without being able to raise any objection to his choice According to Koschaker (Rechtsvergleichende Studien zur Gesetzgebung Hammurapis, p 110) a Babylonian woman was said not to marry, but to be married ‡ And also the bride usually brought a dowry from her father's house according to Kohler and Peiser (Aus dem Babylonischen Rechtsleben IV-11)

The importance which the ancient Hebrews attached to the duties of a child to its parents can be seen from the placing of the law on the subject among the Ten Commandments, and from its position there in the immediate proximity to the commands relating to the duties of men towards God (See Ewald's

* Quoted from Westermarck's "The History of Human Marriage" II p 284.
† Quoted from Westermarck II p. 254-256
‡ Quoted from Westermarck II p. 329

"Antiquities of Israel" p 188) A father might sell his child to relieve his own distress, or offer it to a creditor as a pledge (See Ewald's "Antiquities of Israel" p 190) He has not only unlimited power to marry his daughters (See Benzinger's "Hebraeische Archaeologie" p 107), but even to sell them as maids into concubinage, though not to a foreign people (Exodus XXI-7) He also chose wives for his sons (Genesis, XXIV-4, XXVIII-1, XXXVIII-6, Exodus XXXIV-16, Deuteronomy VII-3), the selection, however, sometimes being made by the mother (Genesis XXI-21), and there is no indication that the subjection of sons ceased after a certain age (See Michaelis's "Commentaries on the Laws of Moses" I-144) *

Of the ancient Arabs Wellhausen says that a woman was betrothed by her wali, or guardian, that is, her father, brother or cousin; but "*of course, the daughter is often asked, by affectionate parents,* whether she wants to have the suitor" (Die Ehe bei den Arabern in Nachr v d Koen Gesell der Wissenschaften zu Goettingen, 1893, p 431) According to Mahommadan law, the woman's consent is not required if she is still under her father's authority Among the Hanafis and the Shia'hs the father's right to carry his daughter without her consent comes to an end when she arrives at puberty (See Ameer Ali's ("Mahommadan Law II-335") †

Among the ancient Romans, in relation to the father of the house, "all in the household were destitute of legal rights—the wife and the child no less than the bullock or the slave" (See Mommsen's "History of Rome" I-74) *The father not only had judicial* authority over his children—implying the right of inflicting capital punishment on them, though not without a just cause, (see Westermarck's "Origin and Development of the Moral Ideas" I-393, 611)—but he could sell them at discretion (see Dionysius s of Halicarnassus's, "Antiquitates Romanae" II-27) Even the grown-up son and his children were subject to the father's authority (Institutiones I-9, 3), and in marriage without conventio in manum a daughter remained in the power of her father or tutor even after marriage. The consent of the *pater-familias* was indispensable to the marriage of children, sons and daughters alike (Institutiones I-10), and so strict was this rule that down to the reign of Marcus Aurelius the

In Rome the marriage portion became a mark of distinction for a legitimate wife A woman had a legal right to demand a dos, or dower, from her father but it was to be given to her husband, not to herself, as a contribution towards the defrayal of the expenses of

* Quoted from Westermarck II p 330
† Quoted from Westermarck II p 331

the joint household—*ad matrimonii onera ferenda*—although it was also intended as a provision in the interests of the wife (See Sohm's Institutes p 465 sqq)

Among the Greeks and Teutons the father had the right to expose his children in their infancy, to sell them in case of urgency as long as they remained in his power, (See Grimm's "Deutsche Rechtsaltertuemer" p 461 and Lesst's "Graeco-italische Rechtsgeschichte" p 60), and to give away his daughters in marriage without consulting their wishes, (see Hruza's "Beitraege zur Geschichte des griechischen und roemishen Familienrechtes" I-9 and others

Caesar states that in Gaul the father had the power of life and death over his wife and children (see Caesar's "Commentarii de bello Gallico" VI-19, 3) M d'Arbois de Jubainville maintains that according to early Celtic law, as in Rome, the authority of the father lasted till his death, but this is not quite borne out by the facts he quotes (See Cours de litterature Celtique VII-244 sqq). In Ancient Ireland the son was under the father's control till formally emancipated, but it is not known at what age the emancipation took place (See Joyce's "Social History of Ancient Ireland" II-13) The Welsh laws refer to the giving of a daughter in marriage by her kindred as well as by her father She does not seem to have been entirely at the disposal of the latter, not to have been, in theory, entirely free (See Rhys's and Brynmor-Jones's "The Welsh People" p 209) * When marrying the daughter it was the father's duty to give her a dowry

A great many such examples may still be quoted Among the Ancient civilized peoples as well as the peoples of our times

88 We also meet in Ancient India with a marriage based on the choice of a suitable husband by the father of the girl independently of her consent and connected with the duty of giving a dowry on the part of the father or the guardian of the girl To this form of marriage in Ancient India belongs the Brâhma-vivâha with two variants i e the Daiva-vivâha and the Prâjâpatya-vivâha The characteristic of this marriage is that the father, or some other person under whose protection the girl is chooses a husband for her and gives her a dowry What the husband is like, when the girl is married and whose is the initiative for such a marriage is of no importance In the same group would come the festive Svayamvara which we meet with in polite literature, it is true that the girl here had some influence in the choice of her future husband but this influence was limited by the number and sort of the suitors invited

* Quoted from Westermarck II p 284 sqq

by her father to the Svayamvara as well as by chance (that is who would win the tournament) The above mentioned three or four forms of marriage are—in my opinion—the highest forms of marriage which were likely to be originated at the same time as or on the ruins of the marriage based on sham purchase i e the Arṣa-vivāha

6. Marriage based on Free Consent of the Bride and the Bridegroom

89 Of various peoples we learn that it is a common custom for women to run away from men who have been forced upon them by their parents (See King's and Fitzroy's "Narrative of the Surveying Voyages of the "Adventure" and "Begle" II-153 Patagonians "Dobrizhoffer's *Account of the Abipones*", *II*-207 Brett's "*Indian* Tribes of Guiana" p 254—Garibs, Fries's "Gronland", p iii Greenlanders) In Pentecost, of the New Hebrides, when a woman has left her husband several times and repeated beatings have not changed her mind, "her parents pay back the money and the husband gives up his wife" (See Speiser's "Two Years with the Natives in the Western Pacific", p 234 sq) Among the Bogos of North-Eastern Africa a woman who has been compelled to marry a man against her will may dissolve the union by three times running away from him (See Munziner's "Ueber die Sitten und das Recht der Bogos," p 64)

A very common method by which a woman can obtain the husband she desires without the consent or against the will of her parents is to elope with him Whilst this practice indicates that the mutual consent of the parties is not always sufficient for the conclusion of a marriage, it also provides a remedy in case of poverty. It is resorted to when the young man is too poor to pay the price asked for the girl or otherwise when from no fault of hers, he is unable to marry her in the ordinary way Sometimes sham elopements are arranged with the consent of the bride's parents in order to save the expenses of a regular wedding (see Blau's ' Nachrichten uber kurdische Stamme', in Zeitschr Deutsch. Morgenland Gesellsch xvi 624 Ahmad Shah's "Four Years in Tibet, p 57, Schotter's "Notes ethnographiques sur les tribes de Koytcheou"/ Chine/in Anthropos, vi 320) or, when the bridegroom is too poor to pay the required price "to save the credit of the bride's family in not having received a sufficient price for her" (See Biddulph's "Tribes of the Hindoo Koosh," p 81) Among many peoples elopement is a veritable institution, recognised by custom as a method of contracting a marriage or at least as a preliminary to it Frequently the lover may later have to pay for his bride or to conciliate her people with some gift (Plains Indians, Pawnee Siksika, Cheremiss of Oufa Ostyaks people of Purang Gonds of the Eastern Ghats,

Kochan's natives of Bali and Tenimber, Roro and Mekeo tribes and Mafulu of British New Guinea, Jabim, people of Songa in Vellala-vella, Banks Islanders, Thonga, Basoga, Latuka, Naudi, Pangwe, Baya) Among the Pawnee and Siksika, in case of elopment, the subsequent presentation of gifts legitimised the marriage and removed the disgrace which otherwise attach to the girl and her family

90 Among various peoples *elopement* is by itself *sufficient to make the runway couple husband and wife* Among the Havasupai of Arizona, if parents refuse to sell their daughter to a suitor and the couple elope, 'this ends the matter' The ethics of the tribe are such that cohabitation once entered upon, the parents have no authority to declare the marriage void And, as a further penalty for his obdurate obstinacy, the father loses the ten dollars or its equivalent he might have had by being kind and complaisant to the desires of the young couple" (See James s "Indians of the Painted Desert Region" p 228 sq) Among the Thompson Indians, even if the father of a girl who has eloped with her lover brought her back, "he could only deliver her up to the young man, as custom declared them already married" (See Teit's in Memoirs American Museum Nat Hist vol II Anthropology I 324) The Dakota, according to Mary Eastman, p 103, have two kinds of marriages, buying a wife and runaway matches, for "it is an understood thing that, when the young people run away, they are to be forgiven at any time they choose to return, whether it should be the next day, or six months afterwards', see Eastman's Dahcotah or Life and Legends of the Sioux around Fort Snelling p 103

It was probably the first stage of the development of the marriage based on the free consent of the bride and the bridegroom

91 In the second stage of the development of this form of marriage the *contracting of marriage follows with the consent of the bride and the bridegroom* but without the consent to the *paterfamilias*

Nowhere is marriage by elopement more frequent, and indeed more needed, than in many Australian tribes (See Malinowski's "The Family among the Australian Aborigines" pp 36-47, 55 sqq and others) Among the Kurnai according to Horwitt, a man, with rare exceptions, "could acquire a wife in one way only, namely, by running off with her secretly and with her own consent Marriage, therefore, was by elopment' It was the business of the *bunjil-yenjin*, a medicine-man, to aid the elopment of young couples, and this gave sanction to the practice, which arose from the difficulty in finding a wife (See Howitt's "Native Tribes of South-East Australia' pp 273, 274, 279) If the parties are prohibited from inter-

marrying on account of the relationship in which they stand to each other, the elopement is punished with great severity, whereas otherwise the lover may, at least in certain circumstances, retain the woman with whom he eloped In many cases he has to fight the man to whom she has been promised or, if she is already married, her husband, or a more general struggle ensues in which kindred are involved, and in either case the issue of the fight decides whether he will be allowed to keep the woman or not (See Howitt's "Native Tribes of South East Australia," pp 216, 222, 258, 194, 236 sqq Petrie's "Reminiscences of Early Queensland", p 60, Roth's 'Ethnological Studies among the North-West Central Queensland Abo rigines" p 181, and others) Among the Wumbai 'the girl was persued by her father and brothers, and the man she had eloped with would have to allow them to strike him on the head with a club, after which in some cases he would retain her But in other cases there was a fight between her kindred, male and female, and those of the man she went off with," (See Howitts 'Native Tribes of South-East Australia," p 194) *

It appears from the above examples that there arises a new form of marriage by elopement from the person who has authority over the girl and the youth Such a marriage can be concluded with the consent of their parents (guardians) This form of marriage may also be connected with the capture of the girl

In the latter stage of the development of the forms of marriage even the *pater familias* or a member of a family loses his right over his children especially his right to interfere in anything concerning their marriage, so that the young man as well as the young girl have the right to decide if they want to marry and whom they want to marry This form of marriage is the highest form of marriage, that which depends only on the free consent of the contracting parties This form of marriage is pre-dominant in our times

92 The same two stages of the development of marriage by the free consent of the bride and bridegroom can be found in *Ancient India*

The ordinary Svayamvara was probably the most primitive form of marriage based on the free consent of the bride and bridegroom as it was in reality a form of punishment imposed on the person obliged to protect the girl because he did not choose a husband for her at the proper time

We find that a woman could obtain the husband she desired without the consent or even against the will of her parents by elop-

* Quoted from Westermarck II p 318 sqq

ing with him (in Ancient India Gandharva-vivaha combined with the Rakṣasa-vivaha) This elopment actually prohibited and punishable—like the Rakṣasa-vivaha was probably the first stage in the development of marriage by the free consent of the bride and bridegroom for it was a spontaneous elopment of the girl with the intended husband chosen by herself, this was characterised in Ancient Indian literature as concubinage The second stage of marriage by free consent of the bride and bridegroom was probably the Gandharva-vivaha not combined with the Rakṣasa vivaha and this was the highest form of marriage as it could be contracted even without the consent of the father or the guardian of the girl

The high place given to this form of marriage in the general list and even its inclusion by Mn (IX 196-197), among the orthodox forms recorded in the Ancient Indian Law is interesting as its marks the first stage of the development of this form the evolution of which has been so extensive

7 Polygamy and Monogamy

93 In the general development of the forms of marriage we meet with another development *i e* with the transition from polygamy to monogamy In this matter we read in Westermarck's 'History of Human Marriage' (III p 104) "The examination into the causes of monogamy and polygamy makes it possible to explain why progress in civilization up to a certain point has proved favourable to polygamy whilst in its highest forms it leads to monogamy The first tendency is largely due to economic and social circumstances—the accumulation and unequal distribution of wealth and increasing social differentiation but it should also be noticed that the considerable surplus of females which among many of the higher savages is caused by their wars is not found at the lowest stages of civilisation where war does not seriously disturb the proportion of the sexes The retrograde tendency towards monogamic in the highest grades of culture, may again, be traced to a variety of causes "

94 Sociology gives us a great many examples of the transition from the system of polygamy to that of monogamy

We see it in Babylon where the foremost Code of Hammurapi assumes that marriage shall be monogamous Among the Hebrews Deuteronomy (XXI 15) certainly presupposes that a man will often have two wives and the law of Exodus (XX 7 sqq) takes it for granted that female slaves will become the concubines either of their owner or of his sons The provisions of the Talmudic Law frequently refer to cases where one man contracts marriage with

more than one wife (See Mielziner's "Jewish Law of Marriage and Divorce" p 30) On the other hand from certain passages of 'Genesis" (II-24 IV-19) and the 'Proverbs" (XXXI-10) and from the general tendency of the Song of Songs" (by Harper XXXIV) it has been argued that monogamy was the Biblical ideal The same is apparent with the Ancient Greeks, (Hruza Beitraege zur Geschichte des Griechischen und roemischen Familienrechtes) in Rome (Willmowitz Moellendorf's "Staat und Gesellschaft der Griechen and Roemer"), the Slavs (Ewer's 'Das aelteste Recht der Russen'), in Ancient Scandinavia (Weinhold's "Alt-Nordisches Leben"), West Germans (Tacitus) and so on *

95 In Ancient India too the same development can be perceived In the Prajapatya-vivaha the formula "may both of you perform together your duties' indicates that this form of marriage was in use only for a monogamous marriage

From the fact that this form of marriage was not known to Vas and Ap and occupied an unimportant place in the general list of the forms of marriage and as it is rarely to be found in the literature it may be admitted that the monogamic idea was in Ancient India still in germ, although it must be supposed that this form of *marriage was gaining in importance as Nar, K, and Kam* † *already* mention Prajapatya vivaha on the second place in the general list of forms of marriage

IV CONCLUSIONS

96 Although the development of the forms of marriage quoted above cannot be exactly proved owing to the lack of sources I have, however the impression that, on the analogy of the general development of the institution of marriage according to sociological literature and taking into account certain rules which do not recognise some forms of marriage and even prohibit them as archaic the development of the forms of marriage from marriage by capture (Rakṣasa vivaha, Paisaca vivaha), to marriage by purchase (Āsura vivaha) and the marriage by sham purchase (Ārṣa vivaha) further to marriage based on the choice of a husband by the father of the girl independently of her consent (Brahma-vivaha, Daiva vivah, Prajapatya vivaha) and lastly to marriage by free consent of the bride and the bridegroom (Gandharva vivaha and ordinary Svayamvara) is likely to be justified In the same manner we can also observe the development of the institution of dowry in Ancient India as that in other countries and among other nations, as well as the slow transition from the polygamic to the monogamic system

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* Quoted from Westermarck III p 41

† From the older sources G and B

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